Appendix A

Sections of 1999 Alaska Statutes that Expressly Relate to Home Rule Municipal Governments

Blank page

Appendix A

Sections of 1999 Alaska Statutes that Expressly Relate to Home Rule Municipal Governments

Title 01. GENERAL PROVISIONS

Chapter 01.10. LAWS AND STATUTES

Sec. 01.10.060. Definitions.

Title 09. CODE OF CIVIL PROCEDURE

Chapter 09.50. ACTIONS WHERE STATE A PARTY

Sec. 09.50.180. Injunction.

Title 14. EDUCATION, LIBRARIES, AND MUSEUMS

Chapter 14.12. ORGANIZATION AND GOVERNMENT OF SCHOOL SYSTEM

Sec. 14.12.010. Districts of state public school system.

Sec. 14.12.100. Application.

Chapter 14.37. LICENSURE OF CHILD CARE FACILITIES

Sec. 14.37.020. Powers of department. [Effective July 1, 2000]..

Title 15. ELECTIONS

Chapter 15.13. STATE ELECTION CAMPAIGNS

Sec. 15.13.010. Applicability.

Title 18. HEALTH, SAFETY, AND HOUSING

Chapter 18.28. STATE ASSISTANCE FOR COMMUNITY HEALTH AIDE PROGRAMS

Sec. 18.28.100. Definitions.

Title 19. HIGHWAYS AND FERRIES

Chapter 19.30. ACCESS ROADS

Sec. 19.30.131. Allocation of funds.

Sec. 19.30.141. Acquisition and construction programs.

Sec. 19.30.241. Definitions.

Sec. 19.30.260. Purpose.

Sec. 19.30.280. Eligibility.

Title 21. INSURANCE

Chapter 21.03. SCOPE OF CODE

Sec. 21.03.060. Pre-emption.

Title 21. INSURANCE cont.

Chapter 21.09. AUTHORIZATION OF INSURERS AND GENERAL REQUIREMENTS

Sec. 21.09.210. Tax.

Title 23. LABOR AND WORKERS' COMPENSATION

Chapter 23.30. ALASKA WORKERS' COMPENSATION ACT

Sec. 23.30.030. Required policy provisions.
Sec. 23.30.045. Employer's liability for compensation.
Sec. 23.30.395. Definitions.

Title 29. MUNICIPAL GOVERNMENT

Chapter 29.04. CLASSIFICATION OF MUNICIPALITIES

Sec. 29.04.010. Home rule.
Sec. 29.04.040. Reclassification of cities.

Chapter 29.05. INCORPORATION

Sec. 29.05.011. Incorporation of a city.
Sec. 29.05.020. Legislative powers of home rule cities. [Repealed, Sec. 1 ch 118, SLA 1972].
Sec. 29.05.031. Incorporation of a borough or unified municipality.
Sec. 29.05.060. Petition.
Sec. 29.05.110. Incorporation election.
Sec. 29.05.140. Transition.
Sec. 29.05.180. Organization grants to cities.

Chapter 29.06. ALTERATION OF MUNICIPALITIES

Sec. 29.06.010. Change of municipal name.
Sec. 29.06.060. Application.
Sec. 29.06.090. Merger and consolidation.
Sec. 29.06.100. Petition.
Sec. 29.06.140. Election.
Sec. 29.06.170. Application.
Sec. 29.06.190. Unification of municipalities authorized.
Sec. 29.06.210. Petition requirements.
Sec. 29.06.230. Duties of charter commission.
Sec. 29.06.240. Composition of charter commission.
Sec. 29.06.280. Requirements for approval of formation and election of charter commission.
Sec. 29.06.320. Charter provisions.
Sec. 29.06.330. Public hearings.
Sec. 29.06.340. Filing of proposed charter.
Sec. 29.06.350. Publication and posting of proposed charter.
Sec. 29.06.360. Election on charter.
Sec. 29.06.370. Effect of the charter after ratification.
Sec. 29.06.390. Transition.
Sec. 29.06.410. Powers of a unified municipality.
Sec. 29.06.420. Application.
Sec. 29.06.450. Methods of dissolution.
Sec. 29.06.530. Application.

Title 29. MUNICIPAL GOVERNMENT cont.

Title 29. MUNICIPAL GOVERNMENT cont.

Chapter 29.35. MUNICIPAL POWERS AND DUTIES cont.

Sec. 29.35.145. Regulation of firearms.
Sec. 29.35.160. Education.
Sec. 29.35.170. Assessment and collection of taxes.
Sec. 29.35.180. Land use regulation.
Sec. 29.35.250. Cities inside boroughs.
Sec. 29.35.260. Cities outside boroughs.
Sec. 29.35.340. Effect of acquiring an areawide power.
Sec. 29.35.550. Application.

Chapter 29.40. PLANNING, PLATTING, AND LAND USE REGULATION

Sec. 29.40.020. Planning commission.
Sec. 29.40.160. Title to vacated area.
Sec. 29.40.200. Subdivisions of state land.

Chapter 29.45. MUNICIPAL TAXATION

Sec. 29.45.010. Property tax.
Sec. 29.45.050. Optional exemptions and exclusions.
Sec. 29.45.550. Cities outside boroughs.
Sec. 29.45.560. Cities inside boroughs.
Sec. 29.45.650. Sales and use tax.
Sec. 29.45.700. Power of levy.
Sec. 29.45.800. Applicability of AS 29.45.010 - 29.45.560.
Sec. 29.45.810. Exemption from municipal taxation.

Chapter 29.47. MUNICIPAL DEBT

Sec. 29.47.200. Payment.
Sec. 29.47.260. Applicability of AS 37.10.085.
Sec. 29.47.470. Taxes or fees on transportation by certain air carriers prohibited.

Chapter 29.60. STATE PROGRAMS

Sec. 29.60.050. Limitation on computation and use of payments.
Sec. 29.60.120. State aid to municipalities and other eligible recipients for health facilities and hospitals.

Chapter 29.65. GENERAL GRANT LAND

Sec. 29.65.140. Application.

Chapter 29.71. GENERAL PROVISIONS

Sec. 29.71.040. Procurement preference for state agricultural and fisheries products.
Sec. 29.71.050. Procurement preferences for recycled Alaska products.
Sec. 29.71.800. Definitions.

Title 30. NAVIGATION, HARBORS, AND SHIPPING

Chapter 30.13. REGIONAL RESOURCE DEVELOPMENT AUTHORITIES

Sec. 30.13.150. Succession.

Title 37. PUBLIC FINANCE

Chapter 37.30. LOCAL GOVERNMENT BONDING

Sec. 37.30.100. Prohibited bidding on bonds.

Title 38. PUBLIC LAND

Chapter 38.05. ALASKA LAND ACT

Sec. 38.05.820. Occupied tide and submerged land.

Sec. 38.05.821. Tideland seaward of public recreational sites.

Title 39. PUBLIC OFFICERS AND EMPLOYEES

Chapter 39.50. PUBLIC OFFICIAL FINANCIAL DISCLOSURE

Sec. 39.50.200. Definitions.

Title 40. PUBLIC RECORDS AND RECORDERS

Chapter 40.15. SUBDIVISIONS AND DEDICATIONS

Sec. 40.15.200. Application to state and political subdivisions.

Title 41. PUBLIC RESOURCES

Chapter 41.15. FORESTS

Sec. 41.15.180. National forest income.

Title 42. PUBLIC UTILITIES AND CARRIERS

Chapter 42.05. ALASKA PUBLIC UTILITIES REGULATORY ACT

Sec. 42.05.641. Regulation by municipality.

Chapter 42.06. PIPELINE ACT

Sec. 42.06.230. Jurisdiction of commission.

Title 43. REVENUE AND TAXATION

Chapter 43.20. ALASKA NET INCOME TAX ACT

Sec. 43.20.290. Exclusive state authority.

Title 44. STATE GOVERNMENT

Chapter 44.33. DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

Sec. 44.33.846. Contracts.

Chapter 44.85. ALASKA MUNICIPAL BOND BANK AUTHORITY

Sec. 44.85.170. Loans to political subdivisions and joint insurance arrangements.

Title 45. TRADE AND COMMERCE

Chapter 45.50. COMPETITIVE PRACTICES AND REGULATION OF COMPETITION

Sec. 45.50.576. Suits by persons injured; treble damages.

Title 46. WATER, AIR, ENERGY, AND ENVIRONMENTAL CONSERVATION

Chapter 46.03. ENVIRONMENTAL CONSERVATION

Sec. 46.03.330. Public pesticide programs.

Chapter 46.40. THE ALASKA COASTAL MANAGEMENT PROGRAM

Sec. 46.40.120. Coastal resource service areas.

Sec. 46.40.210. Definitions.

Blank page

Appendix B

Jefferson v. State, 527 P.2d 37 (Alaska, 1974)

Blank page

*37 527 P.2d 37

Will Key JEFFERSON, Appellant,
v.
STATE of Alaska et al., Appellees.

No. 2000.
Supreme Court of Alaska.
Sept. 27, 1974.

Suit by city resident against city, borough and state to enjoin transfer of control over city's sewer system to borough. The Superior Court, Third Judicial District, James K. Singleton, J., rendered summary judgment in favor of defendants, and plaintiff appealed. The Supreme Court, Fitzgerald, J., held that defect in proportional representation scheme of statute under which borough assembly was established did not render incorporation of borough invalid, and that statute providing that no city, may exercise any area wide power exercised by borough overrides city utility assets without voter approval thus utility asserts without voter approval thus city could transfer its sewer system to borough without voter approval.

Affirmed.

Connor, J., filed a concurring opinion.

1. APPEAL AND ERROR ⚷733
30 ----
30XI Assignment of Errors
30k723 Specification of Errors
30k733 Judgment.
Alaska 1974.
Assignment of error that entry of summary judgment was erroneous because genuine issues of material fact existed was not a specification of error but a conclusory claim that judgment was incorrect and too general to be considered by appellate court.

2. APPEAL AND ERROR ⚷719(1)
30 ----
30XI Assignment of Errors
30k719 Necessity
30k719(1) In general.
Alaska 1974.
Appellant has burden of directing court's attention to specific errors in proceedings below; appellate court will not comb record to seek out errors on behalf of appellant.

3. MUNICIPAL CORPORATIONS ⚷17
268 ----
268I Creation, Alteration, Existence, and Dissolution
268I(A) Incorporation and Incidents of Existence
268k17 De facto corporations.
Alaska 1974.
A municipal corporation may have a de facto existence sufficient to enable it to exercise municipal powers even though it has not complied with all of technical requirements for corporation; however, where there is not a valid law on which to base an incorporation, there can be no de facto existence and no valid exercise of municipal powers.

4. MUNICIPAL CORPORATIONS ⚷18
268 ----
268I Creation, Alteration, Existence, and Dissolution
268I(A) Incorporation and Incidents of Existence
268k18 Attacking validity of incorporation.
Alaska 1974.
Generally, a private person cannot litigate issue of a municipal corporation's de jure existence but can only inquire into its de facto existence; however, a private party can attack de jure existence of municipal corporation in a quo warranto proceeding brought in name of state upon a showing that interest of private party in action is substantially greater than that of public generally and that attorney general will not bring action.

5. MUNICIPAL CORPORATIONS ⚷1.1
268 ----
268I Creation, Alteration, Existence, and Dissolution
268I(A) Incorporation and Incidents of Existence
268k1 Nature and Status as Corporations
268k1.1 In general.

Formerly 268k1
Alaska 1974.
A "de jure municipal corporation" is one which has complied with all of legal requirements necessary to incorporate.

See publication Words and Phrases for other judicial constructions and definitions.

6. MUNICIPAL CORPORATIONS ⚷17

268 ----
268I Creation, Alteration, Existence, and Dissolution
268I(A) Incorporation and Incidents of Existence
268k17 De facto corporations.
Alaska 1974.

A "de facto municipal corporation" is one which has been defectively incorporated through oversight or mistake but which has been operating as a corporation in good faith.

See publication Words and Phrases for other judicial constructions and definitions.

7. MUNICIPAL CORPORATIONS ⚷4
268 ----
268I Creation, Alteration, Existence, and Dissolution
268I(A) Incorporation and Incidents of Existence
268k4 Constitutional provisions.
Alaska 1974.

Ruling, in suit by city resident to enjoin transfer of control over city's sewer system to borough wherein resident alleged that statutes under which borough was incorporated were unconstitutional, that borough obtained de facto status constituted a ruling that statutes under which borough was incorporated were constitutional. AS 29.18.010 et seq.

8. STATUTES ⚷64(1)
361 ----
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) In general.
Alaska 1974.

Test for separability of a statute where one part of it is invalid is whether remaining parts are so independent and complete that it may be presumed that legislature would have enacted valid parts without regard to invalid part.

9. STATUTES ⚷64(4)
361 ----
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(4) Counties, towns, and municipalities.
Alaska 1974.

Even if statutory provision setting forth apportionment of borough assembly seats was unconstitutional, where such provision was clearly separable from provision dictating the number of seats on assembly and other provisions of statute establishing borough assembly, such defect did not render statute unconstitutional. AS 07.10.040, Laws 1962, c. 110, § 2.

10. MUNICIPAL CORPORATIONS ⚷12(1)
268 ----
268I Creation, Alteration, Existence, and Dissolution
268I(A) Incorporation and Incidents of Existence
268k9 General Laws
268k12 Proceedings for Incorporation
268k12(1) In general.
Alaska 1974.

Incorporation of a borough is a process both conceptually and functionally distinct from that of establishing a legislative body for borough; thus, lack of a valid legislative body does not prevent valid incorporation of borough. AS 29.18.010 et seq., 29.23.010 et seq.

11. MUNICIPAL CORPORATIONS ⚷111(2)
268 ----
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) Conformity to constitutional and statutory provisions in general.
Alaska 1974.

A municipal ordinance is not necessarily invalid because it is inconsistent or in conflict with a state statute; determination of its validity rests on whether exercise of authority has been prohibited to municipalities; and prohibition must be either by express terms or by implication such as where statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if other is to be accorded weight of law.

12. MUNICIPAL CORPORATIONS ⚷65
268 ----
268III Legislative Control of Municipal Acts, Rights, and Liabilities
268k65 Local legislation.
Alaska 1974.

Statute which provided that no city, whether home rule or not, could exercise any area wide power once that power was exercised by organized borough

overrode provision of city's home rule charter which prohibited sale or disposition of city's utility assets without voter approval so that city could transfer control over its sewer system to borough without voter approval. Const. art. 10, ***37** §§ 1, 7, 11; AS 29.13.100, 29.33.010(b), 29.33.290(c).

***38** Will Key Jefferson, in pro. per.

John R. Spencer, City Atty., and Vincent P. Vitale, Asst. City Atty., Anchorage, for appellee, City of Anchorage.

Gary Thurlow, Borough Atty., and Denison Lane, Asst. Borough Atty., Anchorage, for appellee, Greater Anchorage Area Borough.

Before RABINOWITZ, Chief Justice, and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, Justices.

OPINION

FITZGERALD, Justice.

Will Key Jefferson brought suit for injunctive and declaratory relief against the State of Alaska, the Greater Anchorage Area Borough, and the City of Anchorage. His complaint consisted of a welter of allegations which makes a logical analysis and treatment difficult. (FN1) The essence of the matter appears to be that the Borough had illegally taken over operation and control of the sewer system of the City of Anchorage, thereby harming Jefferson, a resident and taxpayer in the city.

Some discussion of the factual background of this suit is necessary. In 1966 the Borough held an election in which the following proposition was voted upon by Borough voters:

> 'Shall the (Borough) exercise on an areawide basis the powers and functions concerning sewers, including the operation and maintenance of sanitary sewers and sewage treatment facilities, given to cities of the first class under the laws of the State of Alaska?'

The proposition was approved by the voters. (FN2)

Following the election, the Borough and City entered into negotiations to transfer ***39** the City's sewer system and related assets to the Borough. Extended discussions produced a final agreement as to the terms of the transfer in February of 1970. The agreement was approved by the city council of the City and the assembly of the Borough. Pursuant to that agreement, the Borough has taken control and operation of the City's sewer system as well as its own. In December of 1970 Jefferson brought this suit to enjoin transfer of control to the Borough.

[1] [2] The Borough (FN3) moved for summary judgment, urging that the suit could be resolved as a matter of law because there were no genuine issues of material fact to be determined at a trial. The trial court entered summary judgment in favor of the Borough, City and State, and Jefferson has appealed. Jefferson's allegations may fairly be summarized to include two principal contentions. He urges that the Borough's assumption of the City sewer system was illegal because the Borough is not a legal municipal corporation, and because the City's charter prohibits transfer of municipally owned utilities without an election in which such a transfer is approved by a three-fifths vote. (FN4)

BOROUGH AS LEGAL ENTITY

[3] Jefferson argues that the Borough is not a legal entity, and thus lacks the capacity to exercise powers under the state's municipal code, (FN5) because the statutes under which it was incorporated are unconstitutiona. (FN6)

[4] [5] [6] The Borough responds that Jefferson, as a private person, cannot litigate the issue of the Borough's de jure existence, i. e. that he can only inquire into the Borough's de facto existence. (FN7) While we are in general agreement with this contention, (FN8) we believe it misses the critical ***40** point of Jefferson's argument, that the defect alleged here is so serious that the Borough could not attain even de facto corporate existence.

In Port Valdez Co., Inc. v. City of Valdez, Op. No. 1044, 522 P.2d 1147 (Alaska 1974), this court enumerated the elements of an effective defense of de facto incorporation: (FN9)

> 1) a constitutional or statutory provision under which the incorporation might lawfully have been accomplished;
>
> 2) an attempted compliance in good faith with the

provision(s);

3) a colorable compliance with the provision(s);

4) An assumption in good faith of municipal powers by the corporation.

[7] Jefferson's challenge arises under the first of these elements. He asserts there was no valid constitutional or statutory provision under which the incorporation could have been accomplished. (FN10) The trial court ruled that the Borough had obtained de facto status, thereby ruling implicitly that the statutes under which the Borough was incorporated were constitutional.

The Borough was incorporated pursuant to Chapter 52 S.L.A.1963. That act provided in part that should the Ahchorage Election District #8 fail to incorporate under the local option provisions of A.S. 7.10.010-.140 by January 1, 1964, the area would nevertheless become a borough under the mandate of Ch. 52. (FN11)

[8] [9] Jefferson asserts that the statute under which the Borough assembly was established and which controls the composition and apportionment of the assembly was unconstitutional, thereby vitiating the Borough's legal existence. Assuming that Jefferson is correct in asserting that the proportional representation scheme of former AS 7.10.040 (FN12) was unconstitutional, we do not agree that this defect would necessarily foreclose creation of the Borough ***41** assembly. The statute has four sections. The first section dictated only the number of seats on the assembly; the remaining sections stated how those seats were to be apportioned among the voters. If those apportionment standards were unconstitutional, (FN13) they could have been declared void without affecting the first section, since the first section was clearly separable from the latter sections. The test for separability of a statute (where one part of it is invalid) is whether the remaining parts are so independent and complete that it may be presumed that the legislature would have enacted the valid parts without regard to the invalid part. (FN14) In this case the test is satisfied; we presume that the legislature undertook to establish the number of assemblymen for each class of borough and would have done so whether or not any particular apportionment formula be provided.

[10] Moreover, even were these provisions-the structure of the assembly and the apportionment of assembly seats-completely inseparable, we do not conclude that the lack of a valid legislative body would prevent the valid incorporation of the municipality. This conclusion is bolstered by noting that Alaska's newly-enacted Municipal Government Code (FN15) has completely separated the statutes relating to the incorporation procedure (FN16) from those relating to the borough's legislative body. (FN17) We agree with the legislature that the incorporation of a municipality is a process both conceptually and functionally distinct from that of establishing a legislative body for that corporation.

We are satisfied that there was a valid statute under which the Borough could and did incorporate. Since Jefferson made no claim concerning the other three elements necessary to establish de facto municipal existence, the superior court properly ruled that the Borough was a valid entity as against a collateral attack. (FN18)

THE CITY'S CHARTER

Jefferson argues that the sewer transfer was and is invalid, because the City's home rule charter prohibits the sale or disposition of the City's utility assets unless three-fifths of the City's voters approve the disposition. (FN19) No election was held. (FN20)

The Borough contends that the City's charter is over-ridden by state law in this area. (FN21) In particular, the Borough relies on former (FN22) AS 7.15.310, which provides in part:

'No city of any class, whether home rule or not, within an organized borough, ***42** may exercise any areawide power provided in this section . . . once that power is being exercised by an organized borough.' (FN23)

This court has dealt with conflicts between state law and a municipal home rule charter or ordinance in several cases. (FN24) The starting point for an analysis of this issue must be found in the Alaska constitution, Art. X, s 11:

'A home rule borough or city may exercise all legislative powers not prohibited by law or charter.'

The authors of this provision hoped that its simple language and sweeping grant of power would enable home rule municipalities to meet a multitude of legislative needs without depending on specific grants of power from a state legislature. (FN25) They were aware of the difficulties encountered in other jurisdictions where delegations of power to local government units were conferred in terms, such as 'matters of local concern' or 'of local affairs,' which were intended to create an exclusive sphere of municipal action free from any intrusion by the state legislature. (FN26) Attempts by the courts in those jurisdictions to resolve conflicts between local enactments under such limited delegations of authority and state statutes relating generally to the same subject have often led to confusion and inconsistencies. (FN27) Then too, some commentators have suggested that constitutional or statutory home rule provisions had been rendered ineffective in other states because of restrictive court decisions. (FN28) With this all before then the constitutional delegates undertook to give Alaska home rule municipalities a wide range of powers to meet the differing needs of the varied and scattered communities of this state. It was hoped that the constitutional delegation of authority to local government units under the terms of Art, X, s 11 would lead the courts of this jurisdiction to take a new and independent approach when conflicts ***43** inevitably arose between the municipalities and the state. (FN29) The foundation for this new approach has been laid in the past decisions of this court which have favored the exercise of legislative powers by local government units. (FN30)

[11] However, to say that home rule powers are intended to be broadly applied in Alaska is not to say that they are intended to be pre-eminent. The constitution's authors did not intend to create 'city states with mini-legislature.' (FN31) They wrote into Art. X, s 11 the limitation of municipal authority 'not prohibited by law or charter.' The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern. (FN32) A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law. (FN33)

[12] In this case we find the prohibition to be express. The statutes established a procedure by which certain city powers could be transferred to a second class borough and precluded a city from exercising a power once that power was being exercised areawide. (FN34)

This then presents a clear case in which statutory authority overrides a provision in a home rule charter. Our conclusion is consistent with the new municipal code, which retains in large measure the relevant statutory provisions we have found controlling in this case. (FN35)

***44** Our decision in the case at bar is in accord with this court's opinions relating to cases of conflict between local ordinances and state enactments. In Lien v. City of Ketchikan, (FN36) we held that the home rule provisions of the state constitution validated a lease of a hospital to a charitable non-profit corporation despite non-compliance with a state statute governing leases by municipalities. The statute was held inapplicable and not a limitation upon the city's home rule authority, the source of which is found in Article X, section 7 of Alaska's constitution.

In Chugach Electric Association v. The City of Anchorage (FN37) the issue was whether the City of Anchorage could block the electric association from providing electrical service to a customer within the association's service area. The Alaska Public Service Commission had previously granted the association a certificate of convenience and necessity to provide electrical service within certain areas of the city. The City refused to issue to the Association a building permit on the grounds that the City's own electrical utility could better serve the customer. We resolved the conflict by application of a rule requiring the local enactment to yield where it directly or indirectly impeded implementation of statutes which sought to further a specific statewide policy. This court discerned in the statute a strong policy in favor of treating regulation of public utility service areas as a matter of statewide concern. The situation was one in which locally created variations from state regulation could have affected public utilities beyond the local area. In these circumstances we found a legislative intent that regulated utilities were to be

within the exclusive jurisdiction of the Public Service Commission to the extent that such jurisdiction was conferred upon the Commission. Accordingly, municipalities were prohibited from regulating the same utilities to the extent of the Commission's proper jurisdiction.

In Macauley v. Hildebrand (FN38) a state statute permitted borough assemblies to centralize by ordinance their school district accounting systems with other borough operations with school board consent. An ordinance of the City and Borough of Juneau required the Juneau School District to centralize the district's accounting system without the school board's consent. Although the statutory prohibition in Macauley was direct, this court offered another reason for striking down the questioned ordinance. The statute involved in Macauley was an express delegation by the state legislature to municipal corporations of a constitutionally mandated legislative power. (FN39) We reasoned that the language of the state constitution mandating maintenance of a school system by the state vested the legislature with pervasive control over public education. Thus, home rule municipalities were precluded from exercising power over education unless, and to the extent, delegated by the state legislature; and the local ordinance was therefore overriden by the statute.

Affirmed.

CONNOR, J., concurs separately.

CONNOR, Justice (concurring separately).

I agree with the majority opinion, but wish to add some observations about judicial method in resolving conflicts between state statutes and municipal ordinances. More particularly I wish to discuss the 'local activities rule', and the place it has in the process of determining the validity of ordinances of a home rule municipality.

***45** There is no question that we must adhere to the policy expressed in the constitution which requires that we give a broad reading to the powers of home rule cities and boroughs. That in itself poses no difficulty. This general policy, however, will not solve the real problem, which lies in the inherent potentiality of conflict between statutory law enacted by the legislature and local ordinances.

One possible solution to hold that only where the legislature has expressly declared its intention to prohibit the exercise of municipal powers should we declare municipal ordinances void. Such an approach would have the advantage of simplicity. Unfortunately, such a mechanical jurisprudential technique is so simple that it would not serve the needs of the public. In extreme cases it probably would not survive constitutional attack. (FN1)

The state legislature has expressly prohibited the exercise of total local power in such areas as taxation, AS 29.73.040, AS 29.53.350, AS 29.53.400; utilities regulation, AS 29.48.040-29.48.100; security for bonds, AS 29.58.180(b); municipal elections, AS 29.28.101, AS 29.28.020(b)-29.28.030; and other matters of general state concern. See, AS 29.10.100. It is naive, however, to expect that these prohibitions contemplate each and every matter in which the legislature would properly wish to restrict local power. A home rule concept which relies only on express prohibition to define the scope of local power presupposes a degree of legislative foresight and draftsmanship ability which is completely unrealistic. See Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska Law Journal 232, 239 (1970).

For example, the Uniform Commercial Code, AS 45.05.002 et seq., and the Insurance Code, AS 21.03.010 et seq., enacted by the legislature, no doubt were meant to operate upon a statewide basis, though nothing in those codes expressly prohibits municipal legislation in the field of commercial law or insurance law. Yet to say that a home rule city could alter the operation of such comprehensive statutory systems would be intolerable. Transactions whose reliability is vital to a functioning economy would become unsettled, to the detriment of the business community and the citizenry of the state. A conflict between the city and the state could not be ignored in this type of situation, despite the absence of an express prohibition.

In such instances the courts must resolve the conflict. There is no escape from our duty to adjudicate legal claims which arise from two constitutional provisions of equal dignity, i. e., the grants of power to both the legislature and to home rule cities.

The question, then, is not the propriety of judicial action or abstention. Rather, the problem is what methods should be employed by courts when presented with those conflicts between municipal ordinances and state statutes which will inevitably occur. As with many questions of public law, the answer is to be found through an analysis and weighing of the various social and governmental interests which bear upon such a conflict.

One test we have used in determining whether the ordinance or the statute must yield, is the 'local activities rule.' This test, as applied in Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), and Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971), should not be regarded, as it has been by one commentator, (FN2) as the rule the framers of the constitution rejected in establishing a broad home rule policy. Rather, it should ***46.** be recognized as a realistic tool by which to interpret this policy. The 'local activities rule' requires the court to focus upon whether the particular subject under consideration is of such statewide concern that the exercise of municipal power is inconsistent with the effectuation of statewide policy, as expressed by statute. Some matters are obviously of statewide concern, some less so. Some matters are so traditionally and readily classified as matters of local government that there will be no difficulty in finding that they are within municipal competence. Here, too, the municipal code adopted by the legislature is of great help in delineating the areas of permissible local action.

Inevitably, there will be cases which fall within a gray area. As to those the courts must attempt to balance competing interests, bearing in mind the constitutionally stated policy of permitting maximum home rule and yet preventing the chaotic state of affairs which would result if each home rule municipality were allowed to legislate as though it were a feudal city-state. When dealing with cases in the gray area, the courts must strike a balance as best they can, after careful consideration of the competing interests and public policies which bear upon the outcome. Thus in Chugach Electric Association, supra, 476 P.2d at 123, we spoke of balancing 'the needs of the entire state against the desirable autonomy which only home rule can provide.' The ultimate question, of course, is whether, from an examination of the statutes, a prohibition against home rule powers can be discerned, either expressly or by implication. Fortunately, if the judicial decision in such cases is unacceptable, relief may still be sought from the legislature, which can, if it chooses, alter the determination. A judicial decision of such a question is not, therefore, the end of the controversy.

Those who advocate that the conflict between statutes and ordinances should be resolved by simply holding in favor of home rule in all instances where the legislature has not stated an express prohibition are seeking an illusionary, unworkable solution to a problem which is quite complex and which is, like many things in modern life, not susceptible to decision by mere slogans Or mechanical formulae. 'The price of certainty is too high when it involves a failure to face the real policy questions involved.' (FN3)

I favor the 'local activities rule' applied in Macauley and Chugach, for the rule is, in my opinion, a useful one in resolving the conflict between statute and ordinance.

FN1. Alaska R.Civ.Pro. 8 provides that a complaint shall contain 'a short and plain statement of the claim' showing that the complaint of the claim' showing that the complainant

Professor Wright notes, in regard to the similar federal rule, that the requirement 'of a short and plain statement of claim . . . (has) been held to be violated by needlessly long, repetitious, or confused complaints.' 5 C. Wright & A. Miller, Federal Practice & Procedure (Civil) s 1217, at 128 (1969) (footnotes omitted).

FN2. Passage of the proposition was attested to by the Borough Clerk in an affidavit, and Jefferson has introduced no evidence to the contrary.

FN3. The City and State joined in the motion.

FN4. Jefferson also assigned error to the entry of summary judgment at a time when, he alleges, genuine issues of material fact exist. Such an assignment of error is, of course, too general to be considered by this court. It is in fact not a specification of error but rather a conclusory claim that the judgment is incorrect. Appellant has the burden of directing our attention to specific errors in the proceedings below; this court will not comb the record to seek out errors on behalf of the

appellant.

Jefferson discusses some points in his brief which are not covered by his statement of points on appeal. Because they were not specified and because they have no merit, we will not deal with them in this opinion.

Jefferson also attacks an award of attorneys' fees to the Borough, but we find no record of any order having been entered awarding fees.

FN5. The governing code at the time this suit was initiated was Title 7 of the Alaska Statutes, entitled 'Boroughs', and Title 29, entitled 'Municipal Corporations.' These titles have been repealed and replaced by Title 29, entitled 'Municipal Government.' Chapter 118, S.L.A.1972.

FN6. The general rule is that a municipal corporation may have a de facto existence which is sufficient to enable it to exercise municipal powers even though it has not complied with all of the technical requirements for incorporation. Where, however, there is not a valid law on which to base an incorporation, there can be no de facto existence and no valid exercise of municipal powers. 1 C. Antieau, Municipal Corporation Law ss 1.03, 1.08 (1973).

FN7. A de jure corporation is simply one which has complied with all of the legal requirements necessary to incorporate. A de facto corporation, municipal or otherwise, is one which has been defectively incorporated through oversight or mistake, but which has been operating as a corporation in good faith. See 1 E. McQuillin, Municipal Corporations s 3.45 (3rd rev. ed. 1971); C. Rhyne, Municipal Law s 2-21 (1957).

*46_ FN8. We note the possibility that a private party can attack the de jure existence of a municipal corporation in a 'quo warranto' proceeding brought in the name of the state upon a showing that the interest of the private party in the action is substantially greater than that of the public generally and that the attorney general of this state will not bring such an action. Port Valdez Co., Inc. v. City of Valdez, Op. No. 1044, 522 P.2d 1147 (Alaska, 1974), interpreting AS 9.50.310. Cf., People ex rel. Bowman v. Alaska Airlines, Inc., 108 F.Supp. 274 14 Alaska 85 (D. Alaska 1952), rev'd on other grounds, 206 F.2d 203, 14 Alaska 363 (9th Cir. 1953).

FN9. Port Valdez dealt with an annexation of territory to an existing municipality. The court concluded, however, that annexations are so similar to incorporations that the de facto doctrine is applicable.

FN10. 'Where the statute under which the municipality professed to incorporate was unconstitutional, some cases have permitted private collateral attack, although there are contra cases. The former cases permitting attack seem to represent the better view since there is no possibility of even a de facto municipal corporation where the authorizing statute is unconstitutiona.'

1 C. Antieau, Municipal Corporation Law s 1.08, at 28 (1973) (footnotes omitted).

FN11. Other areas were likewise required to incorporate under Ch. 52 S.L.A.1963.

FN12. Sec. 07.10.040. Standards for composition and apportionment. The borough assembly shall be composed and apportioned according to the following standards.

(1) If there is no first class city within the organized borough, the assembly is composed of the number of seats shown on the following table:

Population	Assembly Seats
under 6,000	5
6,000--12,000	7
12,001--30,000	9
over 30,000	11

(2) If there is but one first class city in the organized borough, the assembly is composed of at least two assemblymen from the first class city and at least three assemblymen from the area outside the first class city.

(3) If there is more than one first class city in the organized borough, the assembly is composed of at least one assemblyman from each first class city and at least three assemblymen from the area outside first class cities.

(4) The assembly seats shall be apportioned as follows:

(a) Except as provided in (2) of this section, each first class city shall have the number of seats designated in the following table, unless a lesser number is approved by a resolution of the city council of the city concerned:

Population	Assembly Seats
under 2,000	1
2,000--6,000	2
6,001--12,000	3
12,001--30,000	4
over 30,000	5

(b) The area outside first class cities shall have a number of assemblymen which shall equal one more than the total number of all assemblymen who represent first class cities.

FN13. Judge Stewart ruled that this representational scheme was unconstitutional in City of Juneau v. Borough First Judicial District Cause No. 65-317 (1968), 6 Alaska L.J. 197-9 (1968).

FN14. See 1 J. Sutherland, Statutory Construction s 2404 (3rd ed. F. Horack 1943).

FN15. Chapter 118, S.L.A.1972 repealed and replaced the statutes under which the Borough was incorporated.

FN16. Chapter 18, of Title 29, entitled 'Incorporation.'

FN17. Chapter 23, Art. 1 of Title 29, entitled 'Borough Assembly.'

FN18. Our disposition of this issue makes it unnecessary to rule on the Borough's contention that Jefferson's complaint was never properly amended to include this attack on the Borough's existence.

FN19. The City of Anchorage has adopted a home rule charter which provides in s 13.4:

'The counsel may sell, lease or otherwise dispose of a municipal utility or of property and interest in property used or useful in the operation of a utility only after a proposition to do so is approved by three-fifths of the electors of the city voting on the proposition.'

FN20. The Borough makes no claim that the areawide sewer election of 1966 satisfied the city charter requirement.

FN21. The City joins the Borough in making this contention.

FN22. This controversy must be decided with reference to the former statutes, see n. 5, supra, governing transfer of powers because Ch. 118, S.L.A.1972 had a savings clause:

'A right or liability of a home rule or general law city or borough existing on September 10, 1972 is not affected by the enactment of this Act.'

***46** FN23. Among the powers 'provided in this section' are those transferred from city to borough pursuant to AS 7.15.350, which provides in part:

'Second class boroughs acquire additional areawide powers in the same manner provided by ss 710-800 of this chapter . . . except that the vote on the question is areawide.'

FN24. It has been claimed our approach has not always been entirely consistent. See Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 U.S.L.A.-Alaska L.R. 1 (1973).

FN25. Art. X, section 1, the introductory section on home rule in the Alaska constitution reads:

'The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdiction. A liberal construction shall be given to the powers of local government units.'

FN26. See Sharp, supra, note 25 at 3. Most courts fail to distinguish between the types of home rule provisions. The provisions of other jurisdictions described in the text are sometimes designated as 'shield' or 'protection' provisions and usually require a court's determination of whether an exercise of municipal power is statewide or local in nature, when such exercise of power conflicts with a state statute. Alaska's home rule provision is a 'grant' or 'sword' of legislative power given to the municipality to be exercised as long as it is not prohibited by law. Art. X, s 11.

This difference between 'shield' and 'sword'

provisions was implicitly recognized in Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) where the court declined to follow California's pre-emption-by-state-occupation-of-the-field doctrine because of the difference between California's and Alaska's home rule provisions. California's provision is a combination 'shield' and 'sword', while Alaska's is solely a 'sword'. See Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 233-35 (Oct. 1970); Sato & Van Alstyne, State and Local Government Law 216-218 (1970).

FN27. Alaska Legislative Council and Local Affairs Agency, Final Report on Borough Government, 36 (1961).

FN28. See Fordham & Asher, Home Rule Powers in Theory and Practice, 9 Ohio St.L.J. 18 (1948): Richard, Courts Nullify Home Rule, 44 Nat'l Mun.Rev. 565-70 (1955); Sato, 'Municipal Affairs' in California, 60 Cal.L.Rev. 1055 (1972). But see also Sandalow, The Limits of Municipal Powers Under Home Rule; A Role for the Courts, 48 Minn.L.R. 643 (1963&1-64).

FN29. See Sharp, Home Rule in Alaska, supra, note 25, at 22-27.

FN30. See Lien v. City of Ketchikan, 383 P.2d 721-723 (Alaska 1963); City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962); Rubey v. City of Fairbanks, 456 P.2d 470-475 (Alaska 1969).

FN31. Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 240 (Oct. 1970).

FN32. See Sharp, supra note 25, at 30-31; Duvall, supra note 27 at 235, 237-239. In Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) this court recognized a prohibition test for conflict resolution between state and local legislation:

'Article X, section 11 of the Alaska constitution provides that a home rule city, such as Fairbanks, 'may exercise all legislative powers not prohibited by law or by charter.' There is no legislative enactment in Alaska that expressly prohibits a home rule city from making assignation a criminal offense. We do not find such prohibition from the fact that the Alaska legislature has extensively covered the field of sexual offenses. We believe there would have to be some additional factor from which the intent of the legislature to prohibit local regulation in this area could be reasonably inferred. We are not aware of any such factor in this case.'

FN33. We reaffirm our rejection of the doctrine of state pre-emption by 'occupying the field.' We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to 'preempt' an entire field, they must so state. See Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969).

We note that the legislature has done this in its new Title 29, Municipal Code. AS 29.13.100 provides in part:

'Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided.'

***46_** FN34. Formerly AS 7.15.350; AS 7.15.310. The statutes further provided that such boroughs (of which the Anchorage borough is one) shall acquire city powers in the manner provided in AS 7.15.710-7.15.800, except that the vote on the question is areawide.

AS 7.15.710-7.15.800 provided for the filing of a petition by the borough with the Local Affairs Agency (now the Dept. of Community and Regional Affairs), review of the approved (as to form) petition by the Local Boundary Commission, a hearing on the petition held by the Local Boundary Commission, and finally an election on the proposal.

FN35. AS 29.33.010(b) (exercise of areawide borough powers); AS 29.33.290(c) (acquisition of additional areawide powers). These are enumerated as specific prohibitions to municipalities in AS 29.13.100. See note 34 supra.

FN36. 383 P.2d 721 (Alaska 1963).

FN37. 476 P.2d 115 (Alaska 1970).

FN38. 491 P.2d 120 (Alaska 1971).

FN39. Alaska Const., Art. VII, s 1:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State.

FN1. Examples are Turner v. Staggs, 510 P.2d 879 (Nev.1973), and Reich v. State Highway Department, 386 Mich. 617, 194 N.W.2d 700 (1972). These cases concern municipal ordinances barring suit by tort claimants unless notice is given within a certain period of time following the injury. Because the time periods provided by ordinance were shorter than the statutory period of limitation applicable to claimants against private persons, the ordinances were in these cases held unconstitutional as denying to tort claimants the equal protection of the laws.

FN2. See, Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 UCLA Alaska Law Review 1, 53 (1973).

FN3. Calif. Governor's Comm'n on the Law of Preemption, Report and Recommendations, 6 (1967), cited in Duvall, supar, at 244.

Blank page

Appendix C

Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 U.C.L.A.—Alaska L.R.1 (1973)

Blank page

HOME RULE IN ALASKA: A CLASH BETWEEN THE CONSTITUTION AND THE COURT

Gerald L. Sharp*

INTRODUCTION

> A home rule borough or city may exercise all legislative powers not prohibited by law or charter.[1]

With this simple and what appears to be alarmingly broad grant of power to home rule municipalities, the constitution of the State of Alaska launched what its drafters must have hoped was a new approach to home rule, an approach unencumbered by the ambiguities of home rule grants which in other states have caused the courts endless problems of interpretation. Grants of home rule have produced not just different but opposite judicial conclusions from state to state; such grants have produced various tests to determine what is and is not within, or protected by, a home rule grant, and, because the courts have been unable to flesh out these tests with any standards, their application often produced inconsistent results.

The two most recent decisions[2] of the Alaska Supreme Court interpreting the home rule section of the Alaska constitution cast serious doubt on whether that court will be able to steer clear of the judicial tangle in which its sister state courts have become enmeshed. These decisions also cast doubt on whether the Alaska court is as sympathetic to the concept of a constitutional grant of broad home rule power as were the drafters of the local government article.

To determine the probable intent of the drafters of the home rule section and of the convention which adopted it in 1956 as a part of the then proposed state constitution, the background and circumstances surrounding its drafting and adoption must be examined. At the time the constitution was written Alaska was still a territory. The local government structure under territorial status did not include home rule for cities.[3] In drafting the local govern-

---

* B.A., University of Washington, 1970; J.D., University of Washington, 1973; Member of the Washington State Bar Association. Assistant to the Attorney for the City and Borough of Juneau, Alaska; Member of the Assembly for the Greater Juneau Borough, 1965-1967. The earliest version of this article was prepared under the supervision of Professor William R. Anderson while the author was a student at the School of Law at the University of Washington.

[1] ALASKA CONST. art. X, § 11.

[2] Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971); Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115 (Alaska 1970).

[3] R. CEASE & J. SAROFF, THE METROPOLITAN EXPERIMENT IN ALASKA: A STUDY OF BOROUGH GOVERNMENT 2-3 (1968) [hereinafter cited as CEASE & SAROFF].

ment article the committee on local government looked to the local government structures of other countries and states and adopted a policy of trying to avoid the problems that had arisen in other states.[4] This article will review the pertinent major trends in home rule as it had developed in various states up to about 1960. This will include an examination of the model home rule proposal of the American Municipal Association.[5] With the then state of home rule as a backdrop the examination will proceed to the history of the drafting and adoption of the home rule section of the Alaska constitution. The article will conclude with an examination of the treatment the home rule section has received at the hands of the Alaska judiciary.

I. Development of Home Rule

A. *Pre-Home Rule Experience*

In the nineteenth century when state-local relationships were less complicated and the functions of a city were simple and limited, cities were able to function under the restrictions of Dillon's Rule.[6] The state legislatures were able to devote sufficient time to the needs of the individual cities to keep local government running well. However, as state level legislative burdens increased, cities received less attention and began to feel the pinch of Judge Dillon's legacy to local government. This led to moves to obtain broader grants of power to cities.

Another force was operating during the last century. The needs of various municipalities were met by the legislature by special acts, acts which were applicable to only a single city. Because this was the mode of operation, and because rural dominated legislatures found the temptation to treat the states' largest city less than fairly,

---

[4] Minutes of the Daily Proceedings, Alaska Constitutional Convention 1955-56, at 2612-13, Alaska Legislative Council, Juneau, Alaska (June 1965) [hereinafter cited as Proceedings].

[5] Model Constitutional Provisions for Municipal Home Rule, American Municipal Association (now the National League of Cities), Chicago (1953) [hereinafter cited as AMA Model]. This proposal was authored by Jefferson B. Fordham, Dean of the Law School, University of Pennsylvania, and is often referred to by the author's name.

[6] 1 J. Dillon, Municipal Corporations, § 237, at 448-56 (5th ed. 1911) [hereinafter cited as Dillon].

> It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the corporation and the power is denied.

Id. (emphasis added).

large cities mobilized against legislative interference with what they considered their internal affairs.

These circumstances led to the adoption in various states of constitutional amendments which provided for a measure of home rule to certain cities. Home rule grants may serve either or both of two distinct purposes: one is to carve out an area in which the municipality enjoys a measure of local autonomy free from legislative interference or control, one in which its acts will supersede those of the state; the second is to overcome the effect of Dillon's Rule, *i.e.*, to create a presumption of the validity of the exercise of a power in the absence of a specific legislative grant. The first is a protective function, while the second is a grant or validating function. In analyzing the scope and effect of home rule, courts and commentators alike have often failed to distinguish between these two functions.[7]

It was most often for the protective purpose that cities sought home rule.[8] St. Louis was the first city to succeed in doing something about legislative abuse through a constitutional provision for charter making.[9]

B. *The Missouri Experience*

In 1875 the State of Missouri incorporated into its constitution several sections pertaining to home rule and to St. Louis.[10] The sections were drafted with an abundance of caution which gave rise to ambiguities the courts of Missouri and other states are still trying to clarify. Because home rule was an untried approach to local government and the convention delegates were reluctant to grant complete sovereignty to a charter city, a restriction that charters must be "consistent with and subject to the constitution and laws of this state"[11] was placed in the constitution. As if this were not sufficient, a provision which applied only to St. Louis required that the charter of that city "always be in harmony with and subject to the constitution and laws of Missouri. . . ."[12]

To those who sought home rule as a road to local autonomy,

---

[7] Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 661-62, 667-68 (1964) [hereinafter cited as Sandalow].

[8] J. MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930, at 298-302 (1933) [hereinafter cited as MCGOLDRICK].

[9] Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385 (1953) [hereinafter cited as Schmandt].

[10] MO. CONST. art. IX, §§ 16-25 (1875).

[11] MO. CONST. art IX, § 16 (1875): "Any city having more than 100,000 inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state . . . ." The Missouri constitution was revised in 1945 and the pertinent section of the constitution, now art. 6, § 19, remains essentially unchanged except for a tenfold reduction in the population requirement.

[12] MO. CONST. art IX, § 23 (1875). This redundant section was dropped in the 1945 revision of the home rule sections.

the new charter making grant with its accompanying subjugation to the laws of Missouri must have appeared an empty grant. With one hand the constitution gave, and with the other it took back. The court, in *Ewing v. Hoblitzelle*,[13] appeared to confirm the fears of the proponents of local autonomy when it ruled that a general law governs when there is a conflict with a charter provision, in this case a conflict over the method of appointing local election judges.

The logical extension of this approach to Missouri home rule would be the complete nullification of any local autonomy in the charter making grant. The court, recognizing that such an extension would render the grant meaningless, took a fresh look at the intent embodied in the grant. Five years after *Ewing* it held in *State ex rel. Kansas City v. Field*[14] that a city charter provision governing street openings acted to repeal a prior state statute on that subject because the matter was one which fell within the domain of municipal government. The *Ewing* decision was distinguished in *Kansas City ex rel. North Park District v. Scavitt*[15] on the basis that state legislative control over home rule charters did not extend to matters of merely local or municipal concern. Later the court rounded out the emerging state-local test when it declared that the charter of St. Louis needed to be in harmony with and subject to only those laws which were of general rather than local concern.[16]

The state-local interest test was sidetracked in *State ex rel. Garner v. Missouri and Kansas Telephone Co.*[17] Here the question was not one of conflict with a state statute but of a city's authority to set rates for local telephone service. The court in disapproving the state-local test recognized the flaw in such a test. It pointed out that no fixed or intelligible rule could be based on the state-local distinction. This inability of courts to make an intelligible distinction between a state and local interest continues to plague courts today. The Missouri court proposed to substitute the equally slippery proprietary-governmental test in its place. A charter city could act without a specific legislative grant only in those areas which pertained to its corporate or proprietary activities. Although this case concerned a grant function of home rule rather than the protective function, the court failed to make that distinction clear.

The disapproval of the state-local test to determine the possession of a power did not prevent the court from using it in subsequent conflict cases, generally to invalidate a municipal enact-

---

[13] 85 Mo. 64, 78 (1884) as cited in Schmandt, *supra* note 9, at 388, n.12.
[14] 99 Mo. 352, 12 S.W. 802 (1889).
[15] 127 Mo. 642, 29 S.W. 845 (1895).
[16] St. Louis v. Meyer, 185 Mo. 583, 84 S.W. 914 (1904).
[17] 189 Mo. 83, 88 S.W. 41 (1905).

ment.[18] However, in 1928, in two conflict cases the court revived the *Garner* proprietary-governmental test to invalidate enactments of the city of St. Louis which were in conflict with state statutes,[19] stating that in matters "of purely municipal corporate concern a special charter may control. . . ."[20]

In attempting to harmonize the state-local and the governmental-proprietary tests the court equated municipal or local concern with proprietary functions.[21] It subsequently announced that the test was no longer one of a state-local interest but was one of corporate-governmental functions.[22] Some of the sting of this latter position may have been taken away by a decision the preceding year which limited the *Garner* decision to a prohibition of charter-city enactments in areas of high governmental prerogative.[23] Thus, setting local telephone rates and prohibiting fortune telling for pay are both governmental functions; the former is one of high governmental prerogative and, absent a statutory delegation, is beyond the authority of a city, while the latter, not having so distinguished a characteristic, is a governmental function which a charter city may exercise without prior statutory authority. The Missouri court has applied and modified the rule with a similar lack of precision in other governmental areas such as taxation.[24]

While the Missouri court was not able to provide any fixed, intelligible test which would permit charter cities to exercise a power with any certainty that such exercise was valid, it did clearly adopt the concept that charter adoption brought with it a measure of local autonomy protected from legislative intrusion. This sphere of exclusive competence is often referred to as an *imperium in imperio*.[25]

The Missouri grant of home rule authorizing certain cities to

---

[18] Schmandt, *supra* note 9.

[19] State *ex rel.* Zoological Bd. v. St. Louis, 318 Mo. 1 S.W.2d 1021 (1928); State *ex rel.* Carpenter v. St. Louis, 318 Mo. 870, 2 S.W.2d 713 (1928).

[20] *Carpenter, supra* note 19 at 894, 2 S.W.2d at 720.

[21] Kansas City v. J. I. Case Threshing Mach. Co., 337 Mo. 913, 87 S.W.2d 195 (1935).

[22] Coleman v. Kansas City, 353 Mo. 150, 161, 182 S.W.2d 74, 77 (1946).

[23] Turner v. Kansas City, 354 Mo. 857, 191 S.W.2d 612 (1945).

[24] Schmandt, *supra* note 9, at 395-404.

[25] The term was first used to describe the state-municipal power relationship in the home rule setting in St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468, 37 L. Ed. 810 (1893). Justice Brewer viewed the Missouri constitutional grant as one which permitted St. Louis to adopt its own "organic law." Thus, as originally conceived, *imperium in imperio* described the power of a home rule municipality to assume certain powers not otherwise specifically granted. It was the granting/validating function of home rule to which the term was applied. However, writers who have used the phrase since then have applied it to describe the function of home rule which creates a sphere of exclusive local competence to act without interference by the legislature. See material cited in text at note 117 *infra*. To maintain uniformity with this usage, the term will be used in this paper to refer to the exclusive competence/protective function of home rule.

frame and adopt a charter for their own government does not by its language require or even directly suggest an *imperium in imperio* result. It is there by judicial interpretation. Once a state has adopted the *imperium* model, whether by judicial construction or by a specific grant,[26] its courts face the impossible task of devising a test to determine what is and is not included within the sphere of exclusive competence of the city. The confusing response of the Missouri court is not atypical.[27]

C. *The California Experience*

In 1879, California adopted a constitutional provision[28] almost identical to the provision adopted in Missouri four years earlier[29] for reasons not unlike those that impelled the Missouri adoption.[30] But the California court was not as generous as the Missouri court and proceeded to give the "subject to and controlled by general laws" clause[31] a literal interpretation,[32] rendering illusory any hope that the charter making grant would create a sphere of local autonomy.[33] This refusal of the court to read any protection for municipalities into the grant led, in 1896, to the adoption of an amendment inserting the clause, "except in municipal affairs," before the "subject to and controlled by general laws" clause.[34] The intent of this amendment was "to prevent the existing provisions of charters from being frittered away by general laws . . . [and] to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, and this internal regulation and control by municipalities form those 'municipal affairs' spoken of in the constitution."[35] The court was, at first, willing to give broad scope

---

[26] COLO. CONST. art. XX, § 6 (1912) which specifically provides that home rule municipal enactments relating to "local and municipal matters" shall supersede conflicting state acts. See note 67 *infra*.

[27] A. MACDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION 60-64 (6th ed. 1956).

[28] CAL. CONST. art. XI, § 8 (1879): "Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the constitution and the laws of this state . . . ."

[29] Compare with Missouri grant, *supra* note 11.

[30] *See* Peppin, *Municipal Home Rule in California*: I, 30 CAL. L. REV. 1, 6-37 (1941).

[31] In addition to the grant of charter making in § 8 (note 28 *supra*), § of art. XI, also adopted in 1879, provided that:

> [C]ities . . . and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws.

[32] Thomason v. Ashworth, 73 Cal. 73, 14 P. 615 (1887); People *ex rel.* Daniels v. Henshaw, 76 Cal. 436, 18 P. 413 (1888); Davies v. City of Los Angeles, 86 Cal. 37, 24 P. 711 (1890).

[33] Jones, *"Municipal Affairs" in the California Constitution*, 1 CAL. L. REV. 132, 133-34 (1913) [hereinafter cited as Jones].

[34] CAL. CONST. art. XI, § 6 (1896):

> [C]ities . . . and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subect to and controlled by general laws.

[35] Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925 (1899).

to the content of "municipal affairs"[36] but admitted that it was "difficult, if not impossible, to give a general definition clearly defining the term 'municipal affairs' and its scope."[37] While the court indicated that it would take a liberal view of those functions within the ambit of "municipal affairs," and that municipalities could be protected from legislative intrusion in such affairs, it nevertheless concluded that no protection existed unless the charter of the city had a provision for the *particular* municipal affair.[38] Thus, the amendment functioned as neither an automatic protection within the area of municipal affairs nor a grant of powers. One commentator suggested that the negative reading of the "except in municipal affairs" clause be changed by constitutional amendment to an affirmative grant of power to legislate in all municipal affairs.[39] His suggestion immediately bore fruit as it was incorporated in the 1914 amendments to the constitution.[40] While this amendment eliminated the grant problem to the extent that municipalities could now assume all powers over municipal affairs by a general charter clause rather than a specific enumeration, as previously required by the court, general laws were still held to control municipal affairs where there was no charter provision covering the subject matter.[41]

The protection given to municipal affairs by a charter is not as absolute as the court in an earlier decision[42] had believed, for in 1941 the court held that where the state, in the accomplishment of a proper statewide objective, enacts a statute which only incidentally affects a municipal affair, such conflicting statute will override the charter protection of the affected municipal affairs.[43] Thus, the charter protection is only against a direct invasion by the state legislature and not an indirect invasion in the execution of a proper statewide objective.

---

[36] *Ex parte* Braun, 141 Cal. 204, 207, 74 P. 780, 782 (1903), where the court interpreted the words of the amendment to be "of wide import, broad enough to include all powers appropriate for a municipality to possess and actually conferred upon it by the sovereign power." The court held that licensing for revenue was a "municipal affair" and therefore a general law prohibiting such a tax was superseded by a charter provision authorizing such a tax.

[37] Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796 (1911).

[38] Clouse v. City of San Diego, 159 Cal. 434, 114 P. 573 (1911).

[39] Jones, *supra* note 33, at 144-46.

[40] Note, *Constitutional Amendment on "Municipal Affairs"*, 1 CAL. L. REV. 456 (1913). As amended, § 6 read:

> Cities and towns hereafter organized under charter framed and adopted by authority of this constitution are hereby empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.

[41] Hyde v. Wilde, 51 Cal. App. 82, 196 P. 118 (1921); Klench v. Board of Pension Fund Comm'rs, 79 Cal. App. 171, 249 P. 46 (1926).

[42] See note 35 *supra* & accompanying text.

[43] Department of Water and Power v. Inyo Chem. Co., 16 Cal. 2d 744, 108 P.2d 410 (1941).

The California court has not been a model of consistency in dealing with the problem of defining municipal affairs. A revenue license tax is a municipal affair not controlled by a state statute prohibiting the same,[44] and a gross receipts tax for revenue purposes laid upon occupation is a municipal affair,[45] but an excise tax on the purchase price of alcoholic beverages sold for consumption on the premises is not a "purely municipal affair."[46] The salaries of policemen and firemen are municipal affairs,[47] but workmen's compensation for injured municipal employees is of state concern.[48]

The California court has occasionally resorted to a characterization process which permits it to reach the desired results. In *City of Pasadena v. Charleville*,[49] a case arising out of a contract of the city for construction of a fence around its water reservoir, the court came to divergent conclusions on two essentially similar matters. The contract in question did not contain a clause relating to minimum wage rates as required by the state wage rate law, nor did it contain a clause prohibiting the employment of aliens as required by the state alien employment act. As to the lack of a wage clause the court found no impediment to the validity of the contract. The project was clearly a municipal affair and the expenditure of local funds on a municipal affair was not controlled by state law where there was a conflicting charter provision. However, the court came to a different conclusion as to the alien employment question. Here the court reasoned that all municipal property, including municipal funds, was actually owned by the people of the state and held in trust for them by the city. Therefore, as to the alien employment law, state policy was supreme. Why state policy in wage rates was not supreme under the same principle of trusteeship does not appear.[50] On the question of the duration of a lien on benefited property arising from a street improvement, the court, in *Raisch v. Myers*,[51] characterized the improvement and the collection of its costs as municipal affairs so the lien arising therefrom also took on the characteristic of a municipal affair in which the city ordinance prevailed over conflicting state laws. A dissenting justice took issue with this approach.[52]

---

[44] *Ex parte* Braun, 141 Cal. 204, 74 P. 780 (1903).

[45] Franklin v. Peterson, 87 Cal. App. 2d 727, 197 P.2d 188 (1948).

[46] Century Plaza Hotel Co. v. City of Los Angeles, 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970).

[47] Popper v. Broderick, 123 Cal. 456, 56 P. 53 (1899).

[48] City of Sacramento v. Industrial Accident Comm'n, 74 Cal. App. 386, 240 P.2d 792 (1925); Healy v. Industrial Accident Comm'n, 41 Cal. 2d 118, 258 P.2d 1 (1953).

[49] 215 Cal. 384, 10 P.2d 745 (1932).

[50] *Recent Decisions*, 21 CAL. L. REV. 173 (1933).

[51] 27 Cal. 2d 773, 167 P.2d 198 (1946).

[52] *Id.* at 782, 167 P.2d at 202-03.

In *City of San Jose v. Lynch*,[53] the court found that it was "settled that the matter of opening, laying out, and improving streets and the *regulation of the manner of their use* are municipal affairs,"[54] while in an earlier decision, *Ex parte Daniels*,[55] the court had declared that the streets of a chartered city belonged to the people of the state and that regulation of vehicle traffic thereon, in spite of a special interest of the people of the municipality, was not a municipal affair. The use which could be regulated as a municipal affair was not the primary use of the streets, but certain secondary uses such as appropriation of space for exclusive use by telephone companies for poles and lines.[56] The same question was again before the court in *City of San Diego v. Southern California Telephone Co.*,[57] and there the court considered the externalities involved in the control by a municipality of the use of its streets for the placement of telephone poles. It concluded that,

> both logically and by decision, the matter must be held to be a municipal affair. . . . This is especially true since the question should be considered in the light of what was then considered as a municipal affair and governed by the situation which existed in 1905 when [the state authorized the use of public streets and highways by telephone companies].[58]

However, when the court considered the same question again only ten years later, it found the same externalities overwhelming and stated that the constitutional concept of municipal affairs was not a fixed or static quantity, but that it changed with a change of the conditions upon which it operated,[59] thus overruling *Southern Cali-*

---

[53] 4 Cal. 2d 760, 52 P.2d 919 (1935).

[54] *Id.* at 764, 52 P.2d at 920 (emphasis added).

[55] 183 Cal. 636, 192 P. 442 (1920).

> The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control. [citations omitted] The right over street traffic is an exercise of a part of the sovereign power of the state. . . . While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state. The rule is that—"Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied."

Id. at 639, 192 P. 444 [citation omitted]. Note here, as in Charleville, notes 46 and 47 *supra*, the role of the municipal trustee doctrine. Also, note the manner in which the court decides a *conflict* question (which arises because of the asserted protective function of a home rule charter) by resort to Dillon's Rule which is an interpretative maxim to aid in determining the *existence* of a power.

[56] Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 276, 118 P. 796, 801 (1911).

[57] 92 Cal. App. 2d 793, 208 P.2d 27 (1949).

[58] *Id.* at 803, 208 P.2d at 33.

[59] Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959).

fornia Telephone both as to the classification of the local telephone franchises as a municipal affair and as to the rule that the classification is made at the time the state enacts the conflicting legislation. The court found the rather muted externalities in an ordinance which would affect visiting pedestrians and motorists sufficient to make it a matter of state concern.[60]

The court, in *Pipoly v. Benson*,[61] reaffirmed its prior holdings that where the legislature has manifested an intent to occupy a field, any ordinance affecting the same matter, even if identical to the state statute, is in conflict with the statute,[62] and that if "even a strained construction can be adopted which will give [the state statute] a constitutional effect,"[63] the court will do so in order to invalidate municipal enactments. When combined with the court's willingness to apply Dillon's Rule to determine whether a matter is a municipal affair or a state concern, there is little left of the protective function in a California municipal charter. Post 1960 decisions tend to confirm this trend.[64]

The dynamic character of municipal affairs, the doctrine of municipal trusteeship, the applicability of Dillon's Rule to determine the statewide or municipal character of a matter, the great weight given to legislative pronouncements of intent in preemption cases, the vulnerability of municipal affairs to indirect control by the legislature, and the general ease with which externalities may be found in almost any municipal action combine to render protected local autonomy in California undependable at best.

D. *The Colorado Experience*

Colorado adopted a constitutional home rule provision in 1912 as a reaction by the city of Denver to legislative intermeddling.[65] The article adopted was novel in some respects. First, it clearly stated that,

---

[60] Lossman v. City of Stockton, 6 Cal. App. 2d 324, 44 P.2d 397 (1935).

[61] 20 Cal. 2d 366, 125 P.2d 482 (1942).

[62] *Id.* at 370, 125 P.2d at 485.

[63] *Id.* at 372, 125 P.2d at 485-86.

[64] *See, In re* Hubbard, 62 Cal. 2d 119, 396 P.2d 809 (1964); Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137 (1969), in which the court states that while the determination of what is of statewide concern is a judicial matter, it will nevertheless give great weight to legislative intent. The court found such stated legislative intent convincing in Century Plaza Hotel Co. v. City of Los Angeles, 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970). The attorney general of California has relied on the *Pipoly, Bishop*, and *Century Plaza* line of reasoning to conclude that the levy by a charter city of an occupational tax for revenue purposes would be a matter of statewide concern considering a legislative pronouncement to that effect. 53 OP. CAL. ATT'Y GEN. 270 (1970). The *Century Plaza* decision and the attorney general's opinion are criticized in Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055, 1098-1105 (1972).

[65] Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 324-25 (1964) [hereinafter cited as Klemme].

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters. . . .[66]

A second novel feature was a detailed but nonexclusive enumeration of local and municipal matters in which charter city legislation would supersede conflicting state regulation.[67] This effort by the drafters of the 1912 amendment to make the constitution speak clearly to the courts has, for the most part, produced satisfactory results in Colorado.[68]

The enumeration is not exclusive so the court has had to determine whether certain other matters were local or municipal concerns or of statewide interest. It has held that certain aspects of traffic regulation are local[69] while if uniformity seems desirable the matter is likely to be classified a statewide matter.[70] But this does not prevent a municipality from regulating a matter of statewide concern so long as it may be classified as a matter of mixed state and local concern.[71] And in the case of a conflict in a matter of mixed concern, the state regulation supersedes the local regulation, but the conflict must be direct in that one must prohibit what the other

---

[66] COLO. CONST. art. XX § 6 (1912).

[67] COLO. CONST. art. XX § 6 (1912):

> [T]he charter of said city or town shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.
>
> [S]uch city or town . . . shall have [certain powers] and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:
>
> (a) [terms, duties, qualifications, etc., of municipal officers and employees].
> (b) The creation of police courts . . .
> (c) The creation of municipal courts . . .
> (d) All matters pertaining to municipal elections . . .
> (e) [matters concerning municipal obligations] . . .
> (f) The consolidation . . . of park or water districts . . .
> (g) The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter.
> (h) The imposition . . . of fines and penalities [for charter or ordinance violations].

[68] Klemme, *supra* note 65, at 359-63.

[69] City & County of Denver v. Henry, 95 Colo. 582, 38 P.2d 895 (1934) (duty to yield right of way a local matter).

[70] People v. Graham, 107 Colo. 202, 110 P.2d (1941) (hit and run regulations a statewide matter).

[71] Provident Loan Soc'y v. City & County of Denver, 64 Colo. 400, 172 P. 10 (1918) (regulation of pawnbrokers); McCormick v. City of Montrose, 105 Colo. 493, 99 P.2d 969 (1940) (regulation of peddlers).

permits.[72] The supplementing of state regulation with more stringent local regulation does not constitute such a conflict as to invalidate the local regulation.[73]

The court, however, has shown a decided deference to legislative action in determining whether a matter is a local or municipal matter. In what appears to be a disregard of the intent of Article XX, section 6(g) of the constitution[74] relating to the levying of local assessments being protected local or municipal affairs, the court ruled that a state statute providing an exemption of nonprofit cemeteries from local assessments was binding on a charter city. In explaining this result the court stated that,

> The legislature of a state has sole power to say what the public policy of the state shall be [and that] public policy must be applicable to all portions of the state. . . . The people of the state, in adopting article XX and the amendments thereto, did not intend to confer upon municipalities organized thereunder the absolute and unrestricted power to tax, or to make assessments for local improvements regardless of public policy.[75]

Such an elevation of public policy as determined by the legislature over that determined by the people speaking through the constitution must be very disturbing to the proponents of local autonomy in Colorado. The court has also indicated a deference to legislative action in the classification of matters not specifically enumerated in the constitution as local or municipal. In *McCormick v. City of Montrose*[76] the court held that regulation of peddlers "at least until the state has seen fit to exercise its police powers with reference to [such matters], is a matter of local concern only." Thus what may be one of the unenumerated local or municipal matters entitled to protection from conflicting state regulation loses its protection as soon as the state enacts a conflicting regulation. Although it does not appear that the court has resorted to the rule implied by the foregoing language to strike a conflicting municipal regulation, it may nevertheless express an attitude of the Colorado court toward the protective function of home rule charters. Subsection (d) of the home rule section of the constitution[77] purports to make all matters pertaining to municipal elections a protected local or municipal matter, but a charter provision which made the council the sole judge of the qualification, elections and returns of its members was

---

[72] Roy v. City & County of Denver, 109 Colo. 74, 121 P.2d 886 (1942).

[73] Provident Loan Soc'y v. City & County of Denver, 64 Colo. 400, 172 P. 10 (1918).

[74] COLO. CONST. art. XX, § 6 (1912) (see note 67 *supra* for text of section).

[75] City & County of Denver v. Tichen, 77 Colo. 212, 235 P. 777 (1925).

[76] 105 Colo. 493, 501, 99 P.2d 969, 972-73 (1940).

[77] See note 67 *supra*.

held not to divest the court of its concurrent jurisdiction over challenges to contested seats.[78]

In what was called "the most important home rule case which has arisen in the past twenty-five years,"[79] a divided court ruled that a state public utilities commission did not have jurisdiction to regulate the local rates charged by a telephone company where a charter city had assumed the power of such regulation.[80] This decision stood until 1952 when it was overruled,[81] the court noting that what was a local or municipal matter could change with time. The court noted that the regulation of local rates of a telephone company that operated both within and without a city would have an effect on the rates charged by the company outside the city and that such externalities rendered the matter a statewide concern.

E. *The Texas Experience*

In 1912 Texas adopted a home rule amendment to its constitution[82] which reads much like the 1875 Missouri provision[83] and the 1879 California provision,[84] except that the Texas provision did not specify the purpose for which a city might adopt a charter, *e.g.*, for its own government. However, the Texas judiciary has given a meaning to the Texas charter-making grant which is different from both the Missouri and the California interpretations.

The critical questions that arise relating to the Texas home rule amendment are (1) does the amendment function as a grant of powers to a municipality or as a protection for certain local powers or both? and (2) what is a general law? and (3) when are a general law and a charter or ordinance inconsistent?

Four years after its adoption, the home rule amendment was interpreted as a grant of power to charter cities. In *Xydias Amusement Co. v. City of Houston*[85] the court ruled that in addition to statutes authorizing the city to regulate immoral exhibitions, the

---

[78] Wells v. People *ex rel.* Dolan, 78 Colo. 77, 239 P. 726 (1925).

[79] Reinhart, *Municipal Home Rule in Colorado*, 28 MICH. L. REV. 382, 390-92 (1930).

[80] City & County of Denver v. Mountain States Tel. & Tel. Co., 67 Colo. 225, 184 P. 604 (1919).

[81] People *ex rel.* Pub. Util. Comm'n v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952).

[82] TEX. CONST. art. XI, §5:

> Cities . . . may . . . adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provisions inconsistent with the Constitution of the State or of the general laws enacted by the Legislature of this State . . . .

[83] MO. CONST. art. IX, § 16 (1875).

[84] CAL. CONST. art. XI, § 6 (1879) (see note 31 *supra* for partial text of section).

[85] 185 S.W. 415 (Tex. Civ. App. 1916).

home rule amendment was a direct source of the needed power. Shortly thereafter, the court of criminal appeals took an even more expansive view of the amendment, stating in *Le Gois v. State*[86] that the power of a charter city was as general and as broad as was the power of the Legislature to act. But in both these cases the court noted that any exercise of such powers was limited by the amendment to an exercise which was not inconsistent with the general laws or the constitution. As both of these cases involved an exercise of the police power the grant appears to include not just proprietary or corporate powers but governmental powers as well. The initial answer given to the first question above, then, was that the home rule amendment granted very broad powers to cities but created absolutely no area of protected local autonomy.

The Texas Supreme Court did not take as generous a view of the amendment. In *City of Arlington v. Lillard*[87] the court held that only those powers which the legislature could delegate were granted by the amendment. The prohibition of buses on certain streets was a nondelegable governmental power, and only functions which were gainful or purely municipal could be delegated.[88] In subsequent cases before the court of civil appeals the court overlooked the *Lillard* decision and continued to find a broad grant of powers in the amendment and the home rule enabling act.[89] The supreme court, in 1948, similarly overlooked the *Lillard* case and in *Forwood v. City of Taylor*[90] held that by virtue of the home rule amendment and enabling act a charter city was the recipient of the full power of self-government, that is, "full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers."[91] In 1950 the supreme court reverted to the broad grants found in *Xydias*[92] and *Le Gois*[93] when in *Dallas County Water Control and Improvement District No. 3 v. City of Dallas*[94] the court stated that "there is authority in the Constitution itself for the exercise of this legislative power by home rule cities."[95] The power in question was

---

[86] 190 S.W. 724, 725 (Tex. Crim. App. 1916).
[87] 294 S.W. 829 (Tex. Sup. Ct. 1927).
[88] *Id.* at 830.
[89] Yellow Cab Transit v. Tuck, 115 S.W.2d 455 (Tex. Civ. App. 1938) (stating at 457 that the purpose of the amendment and the enabling act was to "bestow . . . the power of local self-government and full authority to do whatever the Legislature could theretofore have authorized the city to do."); Leach v. Coleman, 188 S.W.2d 220 (Tex. Civ. App. 1945).
[90] 214 S.W.2d 282 (Tex. Sup. Ct. 1948).
[91] *Id.* at 286.
[92] *See* note 85 *supra.*
[93] *See* note 86 *supra.*
[94] 233 S.W.2d 291 (Tex. Sup. Ct. 1950).
[95] *Id.* at 293.

the power to annex. Thus it would appear that in the early 1950's the home rule amendment, independent of the enabling act, and without reference to the delegability of a power, functioned as a broad grant of legislative powers to home rule cities.

A general law may be one of general application to the private sector of the state, one of general application to the public or municipal sector of the state, or both. If charters and ordinances must not be inconsistent with the second type of general law, but may be inconsistent with the first type, the absurdity of municipal superiority over private acts of statewide concern but not city affairs may result. If home rule charters and ordinances must not be inconsistent with the first type of general law, but may be inconsistent with the second, then the amendment creates a sphere of protected local autonomy, a result which the court has not accepted.[96] One commentator reads the cases as assuming that *any* general law is superior to a charter provision or ordinance,[97] but in at least one case where the ordinance and a law general in its statewide application were in direct verbal conflict the court found no inconsistency because it did not believe the law was intended to apply to cities.[98]

The court has not developed any single or simple standard for determining inconsistency, and probably such a standard would be neither possible of formulation nor wise in light of the many different fact situations in which an apparent inconsistency may arise. It is clear that if a statute which is applicable to cities is in direct conflict with an ordinance or charter,[99] or the ordinance and statute require acts be done which are impossible as a practical matter,[100] the local act is invalid as is any municipal act which purports to undertake an activity specifically prohibited to cities.[101] Where the court finds an implied or express legislative intent to occupy, or to provide the exclusive control, or to regulate an entire field, ordinances within the ambit of that field and which deviate from the statutory provisions are of no effect.[102]

---

[96] City of Beaumont v. Fall, 291, S.W. 202 (Tex. Comm'n App. 1927); Dry v. Davidson, 115 S.W.2d 689 (Tex. Civ. App. 1938).

[97] Rudd, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEX. L. REV. 682, 689-91 (1959).

[98] C.I.O. v. City of Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946).

[99] City of Waco v. Thrall, 128 S.W.2d 462 (Tex. Civ. App. 1939).

[100] Yett v. Cook, 115 Tex. 205, 281 S.W. 837 (1926).

[101] Payne v. Massey, 145 Tex. 237, 196 S.W.2d 493 (1946).

[102] City of Lubbock v. South Plains Hardware Co., 111 S.W.2d 343 (Tex. Civ. App. 1937) (statutory lien is exclusive lien procedure for enforcement of ad valorem taxes); Falfurrias Creamery Co. v. City of Laredo, 276 S.W.2d 351 (Tex. Civ. App. 1955); and Cabell's Inc. v. City of Nacagdoches, 228 S.W.2d 154 (Tex. Civ. App. 1956) (invalidating city attempts to impose more stringent or different regulations within the field occupied by the state in the regulation of milk standards under the state milk act); Gulf, C. & S. F. Ry. v. White, 281 S.W.2d 441 (Tex. Civ. App. 1955)

The more confusing area is that involved in the implications of state licensing or levy of a state occupation tax on certain activities. The imposition of a state occupation tax is recognition of the legality of that activity and a city may not subsequently prohibit it either directly[103] or indirectly.[104] However, where the state imposed an occupation tax on anyone selling certain fireworks, a city ordinance prohibiting the sale of such fireworks was held valid in *Cannon v. City of Dallas*[105] because the court found a purpose of the state occupation tax was to discourage the sale of such fireworks and the ordinance prohibiting such fireworks was consistent with the purpose of the state act. Although the *Cannon* approach could be used where state licensing is involved, the court validated an ordinance requiring a plumber to obtain a permit before making any plumbing installation on the ground that the state law requiring the licensing of plumbers covered a different, although related, subject.[106] The court has used a similar approach in other areas. In *City of Weslaco v. Melton*[107] the court found that while the state had occupied the field of establishing grades of milk, this did not prevent a city from prohibiting the sale of a certain grade of milk within the city. The purpose of the act, statewide uniformity of milk grades, did not go to the activity of selling milk.

In Texas then, the home rule amendment operates by judicial construction as a broad grant of legislative power to charter cities but does not create any area of protected local autonomy. Under this approach the court is not faced with the difficult questions involved in dividing power between state and local governments. The state-local test need never make an appearance in Texas. The only questions of any difficulty turn on matters of inconsistency, and under the home rule systems discussed thus far the courts of other states must deal with the same type of question before they can proceed to the state-local question. While a requirement that ordinances not be inconsistent with general laws has the potential for greater restriction than a requirement that they not be in conflict, the Texas courts have taken a strict approach to this provision of the amendment[108] but, nevertheless, have produced a workable

---

(purpose of statutory grant of eminent domain to railroads could not be thwarted by a municipal zoning ordinance).

[103] City of Fort Worth v. McDonald, 293 S.W.2d 256 (Tex. Civ. App. 1956) (prohibiting pinball machines in face of a state occupation tax on the owners of pinball machines).

[104] Murphy v. Wright, 115 S.W.2d 448 (Tex. Civ. App. 1938) (ordinance setting up conditions for operating dance halls which were physically impossible to meet in that city, while the state imposed a gross receipts tax on dance halls).

[105] 263 S.W.2d 288 (Tex. Civ. App. 1953).

[106] *Ex parte* Beckwith, 144 Tex. Crim. 401, 163 S.W.2d 409 (1942).

[107] 308 S.W.2d 18 (Tex. Sup. Ct. 1957).

[108] J. KEITH, CITY AND COUNTY HOME RULE IN TEXAS 92 (1951) [hereinafter cited as KEITH].

system of local government which does not involve the courts in political decisions.[109]

F. *The Fordham Proposal—AMA Model*

The prime force which led to early adoption of constitutional home rule amendments—legislative intermeddling in the affairs of large cities—was replaced by another concern after the turn of the century. Home rule advocates began to note that what they believed they had gained through constitutional amendment the courts were eroding by judicial interpretation. This erosion was taking place through the application of the state-local test to determine whether a municipal activity was within the protected sphere of local autonomy created by the *imperium in imperio* home rule model most states had adopted. Although the judiciary was often condemned as hostile to home rule or entrapped by the archaic doctrine of Dillon's Rule, it is more probably the case that the judiciary was neither equipped nor the proper forum to make such political decisions as the division of power between competing levels of government.

Under a system of constitutional home rule the courts are faced with a number of difficult questions. Under the *imperium in imperio* models the courts may have to answer the following: What, if any, powers are granted by the constitution? local government powers? municipal powers? proprietary powers? those necessary to perform functions which are vital to local government? those where a substantial local interest is at stake? those where some local interest is involved? those which the legislature could delegate? If the constitution does not make such a direct grant, does a city clothe itself with the granted powers by the mere adoption of a charter or must the charter specifically provide for the assumption and exercise of the powers? Must such an assumption be by a specific enumeration of powers (with those not assumed being denied) or may it be by a general assumption clause? Among those powers granted or assumed, which are protected from legislative interference? Of those powers protected, are they protected only when there is local legislation on the matter or is the legislature forbidden to act at all in such protected local areas? Is there an area in which the state and local governments have concurrent authority, or are the spheres of local and state concern mutually exclusive? May the legislature determine what is of state concern? In using the state-local test to resolve conflicts what conditions must exist before there will be a level of friction which will constitute a prohibited conflict? any act within the field? acts which proscribe (or require) the same type of

[109] Keith, *Home Rule—Texas Style*, 44 NAT'L MUN. REV. 184 (1955).

conduct but differ in degree of restrictiveness? one act which by implication authorizes certain activities (*e.g.*, by taxing such activities) while another prohibits the same activity? one act which specifically authorizes a certain activity while another prohibits, restricts, regulates or taxes the same activity? one act which commands certain conduct while the other prohibits such conduct or makes it impossible to conform to both acts? Must there be substantive legislative acts, or can there be conflict where the legislature has merely prohibited the local government from acting, *i.e.*, where there is no substantive state legislation with which there is a conflict? Is there a difference in the level of friction permitted where the constitution requires local acts be in harmony with, subject to, consistent with, not inconsistent with, or not in conflict with general state laws? What is meant by general laws? laws which apply to all cities (or those of the same class)? laws which apply uniformly throughout the state to nonmunicipal affairs? or laws which apply uniformly without regard to municipal or nonmunicipal characteristics? When a court applies the state-local test to resolve a conflict, should it be more sensitive to friction when the acts are in the area where there is concurrent authority with state legislative supremacy than when the current authority is within the protected local sphere? Just how much interest or concern is necessary to make a matter one of state concern? *de minimus*? some? a substantial amount? a preponderance? Is there any activity of local government which is not touched by some degree of state concern?

A review of the answers the various courts have given to the above questions leads one to the same conclusion Professor McBain expressed when he stated that the construction of the term "municipal affairs" by the California court "did not turn on a question of law or of fact or of mixed fact and law, but merely upon a matter of individual opinion."[110] The judiciary itself has expressed the impossibility of defining municipal affairs[111] or of differentiating between matters of state and local concern.[112] Considering the difficulty of the questions to be answered under the *imperium in imperio* approach to home rule it may not be proper to place the blame for inadequate

---

[110] H. McBain, The Law and Practice of Municipal Home Rule 252 (1916) as cited in McGoldrick, *supra* note 8, at 49.

[111] Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 281, 118 P. 796, 803 (1911): "[I]t has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term "municipal affairs" and its usage." Van Gilder v. City of Madison, 222 Wis. 58, 67, 267 N.W. 25, 28 (1936): "We find no answer to this question [of what is of statewide concern] in any decision of any court in this country." McGoldrick, *supra* note 8, at 47, 66-68.

[112] State *ex rel.* Garner v. Missouri and Kansas Tel. Co., 189 Mo. 83, 104, 88 S.W. 41, 44 (1905): "[N]o fixed, certain, general or intelligible rule can be formulated upon [the state-local concern] distinction . . . ." and the court found it "extremely unfortunate that [it had] ever attempted to solve the problem by drawing [such] a distinction."

judicial response entirely on the courts. The drafters of the constitutional amendments were equally to blame for the courts' responses.[113] Nevertheless, it was this inadequate judicial response which led to efforts to reduce or eliminate the role of the courts in determining the scope of municipal home rule.[114]

In 1953 Dean Jefferson B. Fordham, on behalf of the Committee on Home Rule of the American Municipal Association, put forth a draft proposal for a state constitutional home rule provision. Although it had not been adopted by the AMA when published,[115] it was nevertheless recognized as the AMA model.[116]

The Fordham approach to the problem of the judiciary's inability to cope meaningfully with the state-local dichotomy was not to try to solve a basically unsolvable problem, but to change the problem. The core of the proposal is found in § 6 on home rule charter powers. That section provides that,

> A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute.

The section goes on to prohibit the enactment of certain civil law and also to create a limited sphere of protected local autonomy with respect to the municipal executive, legislative and administrative structure, organization, personnel and procedure.

The comments following this section clarify its intent and purpose. The comments, recognizing that the proposal does not go as far as some home rule advocates would like, confirm the fact that the proposal "does not place any substantive powers and functions beyond legislative control by general law."[117] The comments continue in explanation:

> The theory of the draft is not to create an *imperium in imperio* with municipal freedom from legislative control, but to leave a charter municipality free to exercise any appropriate power or

---

113 *See* text accompanying notes 10-27 *supra*.

114 Fordham, *Home Rule—AMA Model*, 44 NAT'L MUN. REV. 137 (1955) [hereinafter cited as Fordham]; Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URBAN LAW 335 (1971); Sandalow, *supra* note 7, at 660-63; Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571 (1955); Winter, *Municipal Home Rule, A Progress Report?*, 36 NEB. L. REV. 447 (1957).

115 AMA MODEL, *supra* note 5, at 3.

116 Fordham, *supra* note 114.

117 AMA MODEL, *supra* note 5, at 20.

> function except as expressly limited by charter or general statute. This emphatically reverses the old strict-constructionist presumption against the existence of municipal power and, so long as the legislature does not expressly deny a particular power, renders unnecessary petitioning the legislature for enabling legislation. The familiar distinction between state or general concerns and municipal or local affairs, with which the courts are confronted in certain existing home rule states, has not been susceptible to satisfactory application. It has served to shift largely political questions to the judicial forum for decision. The approach here avoids this difficulty.
>
> The draft rejects the asumption that governmental powers and functions are inherently of either general or local concern.[118]

The introduction to the proposal makes it clear that the new approach is to avoid the state-local test.

> [T]he power is there unless clearly denied by positive enactment. The familiar home rule distinction between general and local affairs, a distinction which has defied reasonably predictable application because of its lack of a firm core, is laid aside . . . [Section 6] leaves room for constitutional questions as to what powers a legislature may devolve upon any municipality but makes nothing of the general concerns—local affairs dichotomy.[119]

Fordham's proposal is not without its critics.[120] One weakness of section 6 is that the test of the validity of the exercise of a power is whether the legislature could delegate such a power to a municipality. The potential difficulty some see with such a test is that if the court declares a particular municipal exercise invalid because not delegable, that decision is frozen into the constitution and may not be changed by the legislature even if it deems such an exercise at the local level desirable. But this objection is without substance unless its critics would prefer a grant of power to cities which is greater than anything a legislature may now delegate. The practical danger lies in the situation in which a court is faced with the need to invalidate a municipal exercise in order to reach what it believes to be the correct result. The court's view of what powers may be delegated will be colored by its desire to reach a particular result. As the court's erroneous proclamation of non-delegability will be of constitutional stature, it will be beyond the corrective process of the people acting through their legislature. Texas had a brief encounter with this test at which time it adopted a "purely municipal -governmental" test to determine if a power was delegable and hence one which

---

118 *Id.*

119 *Id.* at 6.

120 Bromage, *Home Rule—NML Model*, 44 NAT'L MUN. REV. 132 (1955) [hereinafter cited as Bromage]; Sandalow, *supra* note 7, at 689-92.

was granted by the constitution to home rule municipalities.[121] The Texas court replaced this test with the much broader one which looks only to whether the state legislature could have *exercised* such a power.[122] Thus the fear of restrictive judicial interpretation, or misconstruction, is a real one.

G. *Summary of Major Home Rule Developments by 1955*

By the mid-fifties there were three distinct developments in home rule. First was what might be termed the indefinite *imperium in imperio* such as adopted by Missouri and California. Such grants were made in terms of self-government in both local and municipal matters,[123] legislative immunity in municipal affairs,[124] powers of local self-government,[125] authority to adopt a charter for its own government,[126] and legislative immunity relating to municipal property, affairs and government.[127] These nebulous grants, and particularly their treatment at the hands of the judiciary, have been the target of much criticism.[128] These grants place the difficult political task of dividing powers between state and local governments on the courts. They place on the court the impossible task of defining or creating standards for determining what is a local matter without at the same time gutting the concept of home rule.

The second line of development was that initiated by Colorado and adopted by the National Municipal League in the 1948 edition of its Model State Constitution.[129] This approach combines the nebulous grant with a partial specific enumeration of functions which are local and protected. While this reduces the court's role in a quantitative manner, it does not remove the difficult state-local

---

121 Green v. City of Amarillo, 244 S.W. 241 (Tex. Civ. App. 1922), *aff'd*, City of Amarillo v. Green, 267 S.W. 702 (Tex. Comm'n App. 1924) (charter may not confer power of legislation in respect to matters that are not purely local concern); City of Arlington v. Lillard, 294 S.W. 289 (Tex. Sup. Ct. 1927) (charter city may not exercise a power which the state may not delegate).

122 Dallas County Water Control and Improvement Dist. No. 3 v. City of Dallas, 233 S.W.2d 291 (Tex. Sup. Ct. 1950) (discarding the delegation test); KEITH, *supra* note 108, at 80-89, 132-33.

123 COLO. CONST., *supra* note 67.

124 CAL. CONST., *supra* note 34.

125 OHIO CONST. art. XVIII, §§ 3 and 7 (1912).

126 MO. CONST., *supra* note 11.

127 N.Y. CONST. art. XII, § 2 (1923).

128 The Colorado, California and Missouri grants were discussed *supra*. The New York grant is the subject of critical comment in Richland, *Courts Nullify Home Rule*, 44 NAT'L MUN. REV. 565-70 (1955); Richland, *Constitutional City Home Rule in New York*, 54 COL. L. REV. 311, 312-15, 327-32 (1954). The Ohio provision and its complications are discussed in Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 20 (1948).

129 Cited in Bromage, *supra* note 120, at 132, 134-35 (1955). This approach was relegated to the position of an alternate provision in 1963 when the League adopted the legislative supremacy approach of the AMA MODEL discussed in the text accompanying notes 115-120 *supra*.

question when a function not specifically enumerated is before the court.

The third line of development has the potential for eliminating the state-local question from the judicial arena. The heart of this approach is a broad constitutional grant of *legislative* power rather than a grant in terms of functional powers or local government powers. However, accompanying this grant is authority for the legislature to limit or control the exercise of such granted power. Under this legislative supremacy approach the judicial focus is first on the question of whether the exercise in question is within the scope of the legislative power granted.[130] The second question is whether the exercise has been limited by the legislature, the constitution or the municipality's charter. Under the Texas grant, home rule municipal enactments must not be *inconsistent* with general laws. Under the AMA model the power in question must not have been *denied*. Thus the second question to be answered relates to the meaning of inconsistent or deny, *i.e.*, what legislative act will constitute the limitation upon the exercise of home rule power.

These three developments, then, constituted the major developments in constitutional home rule when the delegates to the Alaska Constitutional Convention sat down to frame a local government article for what they hoped would be the forty-ninth state.

II. Home Rule Provisions of the Alaska Constitution

A. *Drafting and Adoption of the Local Government Article*

At the convention which convened in 1955 to frame a state constitution as a step in furthering Alaska's efforts at admission to statehood, the task of drafting a local government article fell to seven delegates who comprised the Committee on Local Government. This committee, in its early deliberations, studied local government systems in other countries and states.[131] In its proposal, the committee sought not just to provide Alaska with a system of local government flexible enough to meet the needs peculiar to Alaska but also to avoid the problems that existed in the states.[132] The committee attitude which resulted from its studies of other local govern-

---

130 *E.g.*, under the AMA Model the legislative power held by a home rule municipality is limited to that which could be devolved upon a non-home rule municipality by the legislature. *See* text following note 116 *supra*. A court could still resort to the state-local test where delagability is the standard if the court were to hold that only powers local in nature were delegable. But, in Texas, the only state in the mid-fifties which had the legislative supremacy approach, such a rationale had not gained a respectable foothold.

131 Proceedings at 2611.

132 Proceeding at 2612-13.

ment patterns was that "there wasn't much we could learn; the main lesson lay in what not to do."[133] In a background report[134] prepared by Public Administration Services (PAS) for the convention delegates, issues and trends in local government in other countries and states were discussed in the context of what to avoid.[135] Apropos of home rule the PAS report pointed out that while constitutional home rule provisions have been relatively successful in permitting local self-determination of the *form* of local government,[136] they had been unsuccessful in conveying any broad *legislative* powers.[137] The narrowing of home rule powers by restrictive judicial interpretation was emphasized throughout that part of the report concerned with local government.[138]

The PAS study recommended that the most satisfactory route to home rule would be a general (nebulous) grant coupled with a specific enumeration of major powers and a proviso that the enumeration was not exclusive. The home rule provision of the National Municipal League (NML) Model State Constitution was suggested as meeting the need.[139] At the eighteenth meeting of the Committee on Local Government the home rule provisions of the NML Model were discussed.[140] Later in the same meeting it was emphasized "that home rule should carry all powers not specifically prohibited by constitution or general law."[141] At the next meeting a home rule grant of "all legislative powers not prohibited"[142] was considered for inclusion in the first committee draft of the article. By the time the second committee draft was under consideration it was clear that the committee rejected not only the specific enumeration approach but also any grant based on "local affairs" or "local government" because of the uncertainty created by the continuous judicial interpretation required by such terms. The committee agreed that the grant was to be based upon "legislative powers."[143]

---

133 CEASE & SAROFF, *supra* note 3, at 5.

134 Public Administration Service, Constitutional Studies, Vol. III (Nov. 1955), prepared on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention. [hereinafter cited as 3 PAS Studies] (available at Alaska Legislative Council, Juneau, Alaska).

135 3 PAS Studies at 18.

136 3 PAS Studies at 52.

137 3 PAS Studies at 25, 28, 33, 52.

138 3 PAS Studies at 25, 26, 28, 33, 52.

139 3 PAS Studies at 27. Note that the NML model at the time of the convention took the specific enumeration approach. *See* note 129 *supra* & accompanying text.

140 Minutes of the Comm. on Local Gov't of the Constitutional Convention (November 15 to December 19, 1955) [hereinafter cited as Minutes] (unpublished, available at Office of the Governor, Department of Community and Regional Affairs, Juneau, Alaska).

141 Minutes, 18th meeting.

142 Minutes, 19th meeting.

143 Minutes, 24th meeting.

It is not surprising that the committee took this approach in spite of a contrary recommendation in the PAS study for the study itself emphasized the lack of legislative authority under the conventional *imperium in imperio* or specific enumeration approach.[144] It is also known that John Keith's publication *City and County Home Rule in Texas*[145] was before the committee and was used to develop the Alaska approach.[146] This book contains an excellent description of the development and operation of the Texas system of home rule (broad grant of legislative power coupled with complete legislative supremacy). On the floor of the convention, one committee member described the scheme of the allocation of power in the proposed local government article as the "Texas Plan."[147] While there is no direct evidence that the AMA model was before the committee, it is highly unlikely that such a prominent proposal escaped the attention of the PAS staff and that it was not brought to the attention of the committee. There is strong indirect evidence that the AMA model was before the committee.[148]

The home rule section of the original committee proposal remained unchanged from its introduction at the convention through its adoption as a part of the Alaska Constitution insofar as it granted authority to home rule municipalities to exercise all legislative powers which were not prohibited by law or charter.[149] This provision which resulted from the committee policy of insuring that each local unit of government would have all the authority needed to meet the needs of its area was never directly questioned by the convention. There can be no doubt that section 11 of the local government article was intended to be one of legislative supremacy and that the committee used the Texas approach, if not also the AMA model, as a point of departure.

Because the local government committee was so conscious of avoiding problems it is important to note what the committee rejected and why. The most significant rejection was that of a home rule

---

144 3 PAS Studies at 25, 28, 33, 52.

145 KEITH, *supra* note 108.

146 Office of the Governor, Local Affairs Agency, 2 Alaska Local Gov't., No. 8, at 2 (1962) [hereinafter cited as Alaska Local Gov't]; T. Morehouse & V. Fischer, The State and Local Gov't System: Establishing Area-wide Gov't in Alaska, University of Alaska, Interim Report, n.76 at IV-29 (1970) [hereinafter cited as Morehouse & Fischer].

147 Proceeding at 2613.

148 Public Administration Services, Local Gov't Under the Alaska Constitution 13, 16 (Jan. 9, 1959) [hereinafter cited as PAS Report], stating that the Alaska home rule provision was derived from the AMA model. This was one of a series of reports prepared by PAS on the Alaska Constitution. These reports were to assist officials in the new state in implementing the change from territorial status to statehood (available at Alaska Legislative Council, Juneau, Alaska).

149 *See*, Committee Proposal 6, § 11 in Proceedings, Part 6, at 43-44; Committee Proposal 6a, § 11 in Proceedings, Part 6, at 55; and ALASKA CONST. art. X, § 11.

grant in the nebulous terms of "local affairs" or "local government" for the reason that such grants subjected local government powers to the uncertainties of judicial whim. An experience of the committee when it attempted to divide functions between the city and the borough[150] brought home to the committee the difficulty of drawing any general line which would clearly and properly differentiate between local and areawide functions. The committee recognized that this was the "same question that has plagued the courts for many, many years by trying to interpret constitutions in what are matters of internal concern to a city."[151] The committee abandoned any attempt to make a constitutional division of powers and left the task to the legislature,[152] thus consciously eliminating the role of the courts in dividing power between local and areawide governments.

Another noteworthy deviation is that the grant is of *all* legislative powers. There is no built-in limitation such as exists in the AMA model where legislative delegability confines home rule powers. A similar test of delegability was abandoned by the Texas court in 1950 and an exposition of this point appears in the Keith book which was before the committee.[153] Before its abandonment in Texas, the delegability test had taken on the distinct characteristics of a local affairs test[154] with all its undesirable judicial involvement. The involvement in adopting or interpreting difficult standards is avoided by a grant cast in terms of *all* legislative powers. Read literally, the only question relating to the term "all legislative powers" would be whether the exercise was a legislative power, not what type of legislative power. Keith suggested that because of the breadth of the new standard of home rule powers after the *Dallas* case[155] the court might ultimately have to reduce the grant from one of legislative power equal to that of the legislature to one of legislative powers *pertinent* to local government matters.[156] One Alaskan writer sug-

---

150 Section 8 of Committee Proposal No. 6 (Proceedings, Part 6, at 8-9) extended the jurisdiction of the city to those matters which invoved the area within the city while reserving to the borough jurisdiction in those matters involving the whole or any part of the borough. (The borough is a regional municipality. Chapter 1 of CEASE & SAROFF, *supra* note 3, gives a complete description of the borough system of local government in Alaska).

151 Proceedings at 2653.

152 *Id.* In abandoning the attempt at a constitutional division of city and areawide powers the committee secretary explained the new approach of Committee Proposal No. 6a: "We have left the way open to a flexibility of functions: we have not tried to say, 'Here is the limitation upon one, and here is where the authority of the other one starts.' The legislature has the authority to prescribe this boundary where it seems desirable . . . ." Proceedings at 2654: § 8 of Committee Proposal No. 6a (Proceedings, Part 6, at 54) was rewritten to give the city those functions and powers conferred by law or charter. In the article adopted this provision was moved to § 7.

153 *See* notes 121, 122 & accompanying text.

154 *See* note 121 & accompanying text.

155 *See* note 122 & accompanying text.

156 KEITH, *supra* note 108, at 134-35.

gests that such a test should be read into the Alaska grant.[157] Reasons exist which detract from this suggestion. First, the pertinency test could be adopted in Texas because the grant of legislative powers to home rule cities is of judicial and not constitutional origin. What the judiciary has created it may limit by standards of its own creation. In Alaska the grant is constitutional in origin, and limits on such a grant should be from the same source. Second, a limit in the form of the word "all" already exists in the grant. To read the grant as one of "all legislative powers pertinent to local matters" is to read in a limit which is not only contrary to the plain meaning of the grant but also renders the word "all" superfluous. Nor is there any indication in the committee minutes that there was ever any intention to limit the constitutional grant of legislative powers to home rule municipalities.[158] A test of pertinency to local matters is little more than a broadened "local affairs" test in sheep's clothing, the very test the committee wanted to avoid. Lastly, it is an unwarranted assumption that the committee might have intended such a test. The test was suggested in the Keith book upon which the committee apparently relied, but there is no hint in the home rule sections proposed by the committee or adopted by the convention that any such limitation was intended. The committee was perfectly capable of expressing limitations on local governments and did so in other sections of the article.[159]

Another deviation from the Texas and AMA model is the character of the legislative act which invalidates a home rule exercise of power. Under the Alaska Constitution the home rule legislative power must be *prohibited*.[160] Under the AMA model the power must be denied.[161] The comment explaining that provision of the AMA model states that the power exists for the home rule city "so long as the legislature does not expressly deny it."[162] Under the Texas grant, home rule charters and ordinances may not contain any provision which is *inconsistent* with the constitution or general laws enacted by the legislature. The result of judicial application of this standard in Texas was discussed *supra*.[163] The Keith book which was before the committee made specific reference to what its author believed was a strict interpretation given the "no inconsistency" phrase pointing to a decision in which the Texas court had found inconsistency

---

157 Alaska Local Gov't, *supra* note 146, at 4-5.

158 In relation to home rule and home rule grants of power, the minutes use such terms as "all powers not specifically prohibited" (Minutes, 18th meeting), and "all legislative powers not prohibited" (Minutes, 19th meeting).

159 *E.g.*, in § 2 the term "local government powers" is used, indicating that the committee intended a more limited scope of powers in this non-home rule section.

160 ALASKA CONST. art. X, § 11.

161 AMA MODEL, *supra* note 5, at § 6.

162 AMA MODEL, *supra* note 5, at 20.

163 *See* text accompanying notes 98-103 *supra*.

where the municipality had set a heavier penalty than the state for a penal code violation.[164]

With the foregoing interpretation of the Texas experience before it, it is significant to note that not only did the committee not propose an "inconsistency" or "conflict" standard but that it never used such a term in its discussion of the mechanics for limiting municipal home rule legislative powers.[165] The idea of a specific withdrawal or prohibition indicates that the committee intended some sort of direct action which clearly recognized the home rule power being limited.

B. *Post-Convention Commentary and Non-Judicial Interpretation*

In a document co-authored by the secretary to the Committee on Local Government there is a reiteration of the committee's policy to learn from the mistakes of other states what *not* to do in Alaska local government.[166] Professor W. Brooke Graves had commented earlier that the provision of Article X established local government machinery which precluded "the repetition here in Alaska of a number of the more serious mistakes that have become deeply ingrained in the institutions of local government in many of the older states."[167]

One of the means used to overcome the problems in other states was the broad grant of legislative power to home rule cities. The breadth of this grant has great problem potential. If, when the framers of the constitution used the term "all legislative powers," they really meant *all* legislative power, then the grant is as broad as the Texas grant after which it was modeled, *i.e.*, all legislative powers that the state legislature may exercise. One member of the committee has unequivocally confirmed this interpretation.[168] In a joint publication by the Alaska Legislative Council and the Local Affairs Agency, the scope of the term in question was thought to include "any power constitutionally available to the state legislature. . . ."[169]

The authors of the PAS report, pointing out that the Alaska home rule provision was derived from the AMA model, read a local

---

[164] KEITH, *supra* note 108.

[165] The limitation was discussed in terms of powers "specifically prohibited" (Minutes, 18th meeting); "prohibited" (Minutes, 19th meeting); and "specifically withheld by the legislature" (Minutes, 24th meeting).

[166] Morehouse & Fischer, *supra* note 146, at IV-1, 4.

[167] W. Graves, Establishing Local Gov't in Alaska 1 (Nov. 28, 1959) (unpublished report, available at Alaska Legislative Council, Juneau, Alaska).

[168] Morehouse & Fischer, *supra* note 146, at IV-29.

[169] Alaska Legislative Council & the Local Affairs Agency, Final Rep. on Borough Gov't 5 (Jan. 1961) (available at Alaska Legislative Council, Juneau, Alaska) [hereinafter cited as Final Report].

interest limitation into the Alaska grant.[170] While such a limitation might be found in the AMA model as an incident to its delegability test, clearly no such test is required or implied by the words of the Alaska grant.

The director of the Local Affairs Agency predicted in 1962 that

> In the absence of a comprehensive legislative review of all statutes and the legislative application of necessary prohibitions on the exercise of home rule powers, the courts will be hard pressed not to adopt a rule of conflict or inconsistency or, at least, of implied prohibition on home rule power.[171]

This apparent dilemma prompted the suggestion discussed *supra*[172] that the court could and should adopt a test of pertinency to limit the breadth of the grant.

The pertinency test is quite obviously a substitute for legislative action and as such would constitute judicial legislation. While a court may find some support for rescuing the legislature from a manifest error in one of its acts, it would be a nearly impossible task to find the requisite legislative intent where the legislature failed to consider a particular impact of one of its acts and has taken no action in regard to such impact. It was the intent of the committee to minimize the role of the court, particularly its use of any test which takes on a "local affairs" characteristic. A pertinency test as a judicially created rescue measure would be contrary to constitutional intent.

A "comprehensive legislative review" is not a possibility without foundation. The *Minutes* and *Proceedings* reflect that the state was to take an interest and an active, assistive role in local matters.[173] The constitutional provision[174] requiring the establishment of what is now the Department of Community and Regional Affairs was justified in part by the need for a state agency to monitor local activities and keep the state aware of any need for action in this area.[175] The necessity for consideration of the effects of new legislation on local governments was pointed out in the Keith book upon which the committee relied in creating the Alaska home rule provision. Keith suggested that a full-time bill drafting agency would be one means of avoiding legislation which would have unintended consequences at the municipal level.[176] The PAS report recognized the

---

170 PAS Report at 13-14.
171 Alaska Local Gov't, *supra* note 146, at 4.
172 *See* text accompanying note 146 *supra*.
173 Proceedings at 2617.
174 ALASKA CONST. art. X, § 14.
175 Proceedings at 2741; Minutes, 16th meeting.
176 KEITH, *supra* note 108, at 139-40.

need for immediate legislative action in limiting the powers of home rule municipalities and suggested the enactment of a statute prohibiting home rule municipalities from enacting private or civil law except as an incident to an exercise of independent municipal power and from defining or providing for punishment of a felony.[177] This is the same limitation found in the AMA model.

In 1962 the Advisory Commission on Intergovernmental Relations recommended a constitutional delegation of "all residual functional powers not denied by . . . general law."[178] The Commission recognized the potential effects of such a broad grant and emphasized the need for a careful review to determine the need for affirmative legislative limitations on the delegated power.[179] Thus, under a broad delegation of "all powers not denied" it is recognized by thoughtful observers that the "not denied" phrase casts a responsibility of review on that branch which is authorized to make the denial. In Alaska the authority to deny (prohibit) is clearly cast upon the legislature, and not the court. A judicial denial of a power because it is not pertinent to local government is tantamount to a judicial amendment to the constitution. The application of such a test reveals what powers *should* be prohibited but not which powers *have* been prohibited.

The only significant role left to the judiciary is that of interpreting the word "prohibited." Observers have noted, and it follows even a casual reading of the committee minutes and convention proceedings, that the state-local test was rejected and that the court must look not to the interests involved, but to whether there has been a prohibition.[180] What is vital to note is that the Alaska home rule grant *does not create* an *imperium in imperio*. Therefore, there is no area of local immunity or local legislative superiority which is created by the grant.[181] The state-local test has been used in two distinct situations relevant to home rule powers: one is to determine

---

177 PAS Report at 14.

178 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL RESTRICTION UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT 74 (1962).

179 *Id.* at 73.

180 Alaska Local Gov't, *supra* note 146, at 3-4; Final Report, *supra* note 169, at 37.

181 This is not to say that home rule municipalities in Alaska do not have a measure of legislative immunity or protection. Article X, section 2 provides that "All local government powers shall be vested in boroughs and cities." If this is interpreted to mean that, except as otherwise provided in the constitution, the legisature may not exercise any local government powers, then *all* municipalities in Alaska possess a measure of local immunity, the extent of which would be determined by a state-local test. While it is clear that the primary purpose of section 2 was to prevent the creation of more than two forms or levels of local government, the suggested interpretation finds some indirect support in the Proceedings. For a similar conclusion, see Comment, *Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning*, 8 ALASKA L.J. 232, 236-37 (1970).

whether a municipal ordinance or state statute will prevail when the two are in conflict. This application of the test arises in the *imperium in imperio* setting, *i.e.*, it makes sense only when the court has determined that there is a conflict which must be resolved and the municipality has been given a sphere of immunity from state interference in local affairs. The other situation in which the state-local test may be applied is when it is necessary to determine whether a municipality has the authority to act. The application of the test to determine municipal authority results in a narrow and restrictive interpretation of local government powers as the municipality will not be able to act in areas of state concern, even where there is concurrent local interest. It is admitted that the judiciary could be more lenient in balancing interests when applying the test to determine the possession of a power in the absence of a conflict than in applying it to resolve a conflict, but it is such standardless judicial flexibility which has led to the criticism of the court's erosion of municipal powers.

It is beyond question that the *imperium in imperio* model was rejected by the framers of the Alaska constitution and that there is nothing in Article X, section 11 of the constitution which impels or even suggests a state-local test. As an *imperium in imperio* is essential to the first situation discussed above and as the resolution of a conflict to determine whether the municipal act is protected can not arise under section 11, there will be no occasion for the court to apply the test under that situation. Questions will arise over whether the municipality has the authority to act, and here the language of section 11 clearly spells out the test—it is one of prohibition, not state-local interest. Thus in the only one of the situations discussed which should ever be before the court the constitution sets forth a test quite different from the state-local test.

1. A Suggested Rule for Conflict Resolution

Assuming then that the court will be faced only with questions of whether a home rule municipality has been prohibited from acting, the question of resolving conflicts with state statutes arises. Some rationale must be developed which will produce a legislative intent to prohibit when such intent does not clearly appear in the legislative act.

If the grant of "all legislative power" is to be given the meaning of its Texas predecessor, namely, legislative power as broad as that possessed by the state legislature, and if that grant is to be construed in the light of the interpretative mandate[182] of Article X, section 1

---

[182] ALASKA CONST. art. X, § 1: "A liberal construction shall be given to the

requiring a liberal construction be given to municipal powers, one is compelled to the initial conclusion that legislative acts of a home rule municipality rise in dignity to a level close to those of the state legislature. Municipal home rule acts are inferior only in that they are subject to being prohibited by the municipality's charter and by an act of the state legislature.[183] Accepting this near equality of the two acts, the resolution of a conflict between the two (when the home rule municipality's act has not been clearly prohibited) is apparent: the court should resolve the conflict in the same manner it resolves a conflict between two acts of the legislature. When it is asserted that two acts of the legislature are in conflict, the question is whether there is such a conflict as will compel the court to find an implied intent on the part of the legislature to repeal the prior conflicting act. It is the duty of the court to construe statutes in a manner which will produce harmony.[184] As repeal by implication is disfavored by the courts, only when no reasonable construction can be found which will permit both acts to stand should the court resort to implied repeal by the dominant statute.[185] If the court were to adopt this approach, the question of the level of friction which will cause the court to invalidate a home rule enactment would be clearly established as that which exists when there is an irreconcilable conflict.[186]

In the application of this principle of construction to two state statutes the dominant act is the most recent enactment. But, because the legislature has the power to prohibit the exercise of specific home rule legislative powers, the state act will always occupy the dominant position vis-à-vis a conflicting home rule act regardless of the chronology of enactment. With this slight change it is contended that the application of the above rule would serve to reconcile conflicts between state and local home rule acts by giving the status to home rule acts intended by the drafters of the constitution.

2. Other Approaches to Conflict Resolution

One writer has urged that a doctrine of implied pre-emption be adopted and that its application be governed by a balancing of

---

powers of local government units." The convention debates on this article (Proceedings at 2691) indicate that the committee felt that this interpretative guide was to protect non-home rule municipalities, and that the grant of home rule power was so clearly a liberal and broad grant that home rule powers did not need protection from the judiciary. Thus, whether the "liberal construction" clause applies to home power interpretations or not, the committee intended such powers to receive a liberal treatment by the court.

183 Both state and local acts are limited by state and federal constitutions.

184 Gordon v. Burgess Constr. Co., 425 P.2d 602 (Alaska 1967); 50 Am. Jur. *Statutes* § 541 (1944).

185 50 Am. Jur. *Statutes* § 538 (1944).

186 *Id.* at § 543.

state and local interests.[187] The committee minutes, the convention proceedings, and the majority of the post-convention publications relating to home rule all indicate a contrary result. The concept of dividing powers or determining their existence by balancing state and local interests was the very concept which the drafters clearly sought to avoid. The implied pre-emption test has been severely criticized for the uncertain results it produces.[188] As such uncertainty was one of the conditions which led the committee to minimize the role of the judiciary in the determination of the powers of local government,[189] it would be contrary to the spirit and intent of the constitution for the court to increase its role in the division of powers by riding into such matters on the implied pre-emption test. The adoption of the implied repeal approach will eliminate the need to resort to the doctrine of implied pre-emption and its state-local aspects.

One other problem which the Alaska grant overcomes is the question of the source of the home rule powers—the charter or the constitution. In California the source is the charter, and for home rule to be effective in a particular subject matter, it must be covered in the charter.[190] The source of Alaskan home rule powers is the constitution. By the adoption of a charter under Article X, section 9[191] a municipality becomes a home rule municipality. The constitution then describes the powers which a home rule municipality may exercise as "all legislative powers not prohibited by law or by charter."[192] Upon the *adoption* of the charter those powers of section 11 are available to the home rule municipality. It is the act of adopting the charter, and not the assumption of powers in charter, that renders available "all legislative powers not prohibited." Indeed, if the powers did flow from the charter there would be no need to *prohibit* the exercise of a power in a charter for any power not assumed would be unavailable. There must first exist a power that may be prohibited before a prohibition makes any sense. The committee minutes reveal that "home rule should carry all powers not specifically prohibited"[193] and that the constitution should include a provision which would make a "*grant* of all legislative powers not prohibited."[194] In Texas the constitution is the source of home rule

---

187 Comment, *supra* note 181, at 242-44.

188 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW, § 5.38 at 292.38 (1968). The Alaska Supreme Court has indicated its general agreement with the Antieau criticism in Chugach Elec. Assn. v. City of Anchorage, 476 P.2d 115, 120 (Alaska 1970).

189 Minutes, 24th meeting.

190 *See* text accompanying notes 38-41 *supra*.

191 ALASKA CONST. art. X, § 9 authorizes the voters of any borough or city of the first cass to adopt, amend or repeal a home rule charter.

192 ALASKA CONST. art. X, § 11.

193 Minutes, 18th meeting, para. 9.

194 Minutes, 19th meeting (emphasis added).

powers,[195] and the constitution is clearly the source of power under the AMA model,[196] both of which are similar to the Alaska grant. Failure to recognize this feature of the Alaska grant led one writer[197] to the incorrect conclusion that the statutory prohibition on adoption of a charter in conflict with laws of the state[198] extended to ordinances in conflict with state law.

3. Aids and False Aids to Construction

In construing the local government article the court would look, ideally, to the same sources the convention delegates looked for guidance. But perhaps even more important is that the court should not seek guidance from those sources which the committee (and subsequently the convention delegates) clearly rejected. The committee approach of studying other systems of local government in order to learn what to do has already been discussed.[199] One of the provisions of the article which the committee felt would communicate to the courts that it should not seek help from court decisions of most other states was the liberal construction clause.[200] Through this clause the committee hoped to let the court know that it was dealing with something new. Probably the clearest statement

---

[195] *See* text accompanying notes 90-95 *supra*.

[196] AMA MODEL, *supra* note 5, at 19-20, comment 1.

[197] Comment, *supra* note 181, at 239.

[198] AS 29.040.010 (1959). However, the 1972 legislature, in a comprehensive recodification of the borough code (Title 07) and municipal code (Title 29) into a single code (Title 29), rewrote this section. The conflict standard imposed by the original section had been criticized in Alaska Local Gov't (*supra* note 146, at 73) as possibly unconstitutional. The new section, now AS 29.13.010, provides that "A first class municipality may adopt a charter *for its own government*." (emphasis added) This is the grant of home rule which gave, and continues to give, the Missouri court great difficulty in interpretation (*see* text accompanying notes 10-27 *supra*). It is the source of the *imperium in imperio* doctrine, and if these words appeared in the constitution, they would probably be interpreted to create a sphere of local immunity to legislative action in matters of local concern. As a legislative grant it does not have that effect. It is this form of grant which the drafters of the Alaska constitutional home rule grant consciously rejected. While it is not clear what the legislature intended to accomplish by the addition of the phrase "for its own government," it is highly probable that it will have the most unfortunate effect of encouraging the court in its current misquided use of the state-local test (*see* text accompanying notes 243-79 *infra*). The legislature should give serious consideration to amending the sentence to harmonize with its counterpart in the constitution (art. X, § 9). The amended sentence would then read, "A first class municipality may adopt a home rule charter."

[199] *See* text accompanying notes 131-35 *supra*.

[200] After noting that the usual rigid and narrow interpretations given to local government provisions would defeat the purpose and intent of the article, the committee went on to note that: "Since the article creates something new to the courts, they will receive guidance from § 1" (Minutes, 26th meeting). As originally drafted by the committee the liberal construction clause applied to "the provisions of this article" (Committee Proposal No. 6 & 6a, § 1, Proceedings, Part 6, at 40, 52). Attorney-delegates argued that such an interpretive rule should not appear in the constitution for various reasons. After the defeat by one vote of an amendment to remove the clause from section 1, a compromise was worked out which limited the application of the clause to "powers of local government," the committee agreeing that this change would not defeat its intent (Proceedings at 26900-96, 2708-10).

to this effect was made by Professor Fischer, who was the secretary to the committee, when he said that Alaska would "be pioneering in interpreting the home rule provisions, and it would be extremely fallacious to rely on the experiences of other states with their entirely different and inapplicable constitutional language."[201]

III. Judicial Interpretation of the Home Rule Article

A. *The Early Cases— 1962 to 1969*

One of the earliest cases in which home rule powers were urged as supporting a municipal enactment was *City of Juneau v. Hixson*[202] which involved an ordinance passed by the council of the home rule city of Juneau authorizing the sale of bonds for a purpose which the court held was prohibited by the state constitution.[203] The court held that "any political subdivision" as used in the constitution included a home rule municipality and the constitutional limitation on any political subdivision constituted a prohibition on the exercise of the powers granted home rule cities.[204] The court, not unexpectedly, read back into Article X, section 11 what the Committee on Style and Drafting had deleted,[205] namely, that home rule powers are subject to constitutional limitations. In the course of the opinion, the court made two other statements relating to home rule. First, the city acquired greater legislative power upon becoming a home rule city, and second, a "*constitutional grant* of legislative power" was involved.[206] The court, by way of dictum in a case the following year, noted that a home rule city was "clothed with considerably broader powers than the usual municipal corporation Alaska."[207]

Lien v. City of Ketchikan[208] was the first decision to give some judicial breadth and meaning to the home rule provisions of the constitution. The home rule city of Ketchikan had constructed a

---

201 Speech before the Anchorage Chamber of Commerce at 4 as cited in R. Cease, Areawide Local Government in the State of Alaska: The Genesis, Establishment, and Organization of Borough Government 20 (1964) (an unpublished doctoral dissertation, Claremont Graduate School; also available through the Alaska Historical Library, Juneau, Alaska).

202 Juneau v. Hixson, 373 P.2d 743 (Alaska 1962).

203 Alaska Const. art. IX, § 9 (prohibiting local debts for other than capital improvements).

204 373 P.2d at 749.

205 The proposed § 11 as approved and sent to the Committee on Style and Drafting allowed a prohibition of the exercise of the home rule to be made by law, by charter, and "by this constitution." Committee Proposal No. 6a, Proceedings, Part 6, at 55. There were no amendments to this section prior to transmission to the Committee on Style and Drafting. The section, without being amended on the floor after its return from Style and Drafting, was approved and became a part of the constitution without the unnecessary phrase "by this constitution."

206 373 P.2d 743 (emphasis added).

207 Brayton v. City of Anchorage, 386 P.2d 832, 833 (Alaska 1963).

208 Lien v. City of Ketchian, 383 P.2d 721 (Alaska 1963).

hospital with state and federal financial assistance and sought to lease it to a religious order for operation.[209] The charter of the city set out certain procedural requirements which covered the proposed lease and with which the city had complied.[210] A statute granting municipalities authority to lease real property required a prior council finding that the property was no longer required for municipal purposes.[211] The charter contained no such requirement, and no such finding had been made. Appellant contended that the city had no authority to make a lease without complying with the statutory procedure. The court held that a statute authorizing municipalities to lease property was not relevant where the powers of a home rule city were being considered. The statute was not the source of the city's power to lease and therefore was not a limitation on that power.[212] The court relied in part on Article X, section 7 which provides that "Cities shall have the powers and functions conferred by law or charter."[213] This section, the court believed, directed it to look to the charter, and not a statute, to determine whether a power had been conferred upon the city.

If the court were dealing with a non-legislative power, it might be true that the charter would be the source, but in light of Article X, section 11 this is not the case for legislative powers.[214] By that section all legislative powers not prohibited become available to a city upon adoption of a home rule charter, and the court should look to the charter not to see what has been conferred, but what has been prohibited or limited. And the court would look to the statutes for the same reason. Further, if under section 7 cities have the powers conferred by law, the same broad grant would have occurred through AS 29.05.020 which provided that home rule cities "shall have all powers not prohibited by law or charter."[215] The broader "all powers" grant, whether legislative or constitutional, would have included any legislative powers conferred by the charter.

The court concluded that,

> It would be incongruous to recognize the constitutional provision stating that a home rule city 'may exercise all legislative powers not prohibited by law or by charter,' and then to say that the power of a home rule city is measured by a legislative act.[216]

---

209 *Id.* at 722.

210 Brief of Appellees at 8, 14, 15, Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963).

211 AS 29.10.132(a) (1959).

212 383 P.2d at 723.

213 ALASKA CONST. art. X, § 7.

214 *See* text accompanying notes 190-96 *supra.*

215 AS 29.05.020 (1959). This provision appears in the new municipal code as AS 29.08.010: "[A home rule municipality] has all legislative powers not prohibited by law or charter."

216 383 P.2d at 723.

What emerges from the *Lien* case is that a statute which only grants power to a general law city does not constitute a limitation on a city which has adopted a home rule charter. The result here recognizes the same principle as was recognized in *Forwood v. City of Taylor*[217] where the Texas Supreme Court declared that laws meant to apply to general law cities had no application to home rule cities and for that reason could not be inconsistent with home rule enactments. It is significant that in spite of the apparent conflict between the state and local enactments, the court did not resort to a local activities rule, state-local test, or other similar approach to resolve the apparent conflict. The court does not in any way indicate that it has characterized, nor found it necessary to characterize, the activity of leasing municipal property as a local concern. Instead it focuses on the question of whether the city possessed the power to act as it did.

If the court had applied the implied repeal approach suggested *supra*[218] to the asserted conflict, the statute and ordinance would have been harmonized on the same ground, *i.e.*, the statute was not intended to apply to home rule cities, hence there is no conflict.

Maier v. City of Ketchikan[219] involved another apparent conflict. The appellant had been injured by a city-owned electric line and had failed to notify the city of his claim within four months of the injury as required by the city charter. Notification within the four month period was required before suit could be brought. The statute of limitations on tort suits was two years.

Appellant argued that the notice provision of the charter should apply to injuries arising out of governmental functions only. The court responded that the purpose of the provision was to permit the city to promptly investigate and settle the claim without a court suit and that the provision would apply without regard to the governmental or proprietary nature of the function.[220] Appellant also contended that the charter provision was void because it conflicted with the state statute of limitations. Without stating that the charter provision would have been void if there had been a conflict the court harmonized the two in holding that there was no conflict because the charter did not limit the time within which an action could be brought, it merely imposed a pre-requisite to the right to commence the action.[221]

---

217 214 S.W.2d 282 (Tex. Sup. Ct., 1948).
218 *See* text accompanying notes 182-86 *supra*.
219 Maier v. City of Ketchikan, 403 P.2d 34 (Alaska 1965).
220 *Id.* at 36.
221 *Id.*

No clear principle emerges from this decision. The court was urged to adopt the governmental-proprietary test (a test which is similar to, and often interchanged with, the state-local test) in interpreting a charter provision, but rejected such an approach. It either assumed the validity of the exercise of the power to require notice or found it valid because of some characteristic of the purpose of the limitation. The court gives no clue as to how it arrived at this apparent assumption. What can be seen with more clarity is that in relation to the statute of limitations claim the court did not succumb to a situation in which it could easily have found not only conflict, but an overriding state interest. The result here is the same as would have been obtained if the court had applied the implied repeal approach to alleged conflicts.

In 1969 the court was faced with a pre-emption argument. The home rule city of Fairbanks had made assignation a criminal offense and Twyla Mae Rubey had been convicted under the city ordinance.[222] The appeal of her conviction came before the court in *Rubey v. City of Fairbanks*.[223] In relying on the California case of *In re Lane*,[224] the appellant contended that the legislature's extensive regulation of sexual behavior was evidence of intent to pre-empt that field.[225] The court rejected this contention.

> We are not persuaded to adopt the doctrine of the Lane case. California's constitutional prohibition against local regulations is different from Alaska's. Article XI, section 11 of the California constitution provides that a city "may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Article X, section 11 of the Alaska constitution provides that a home rule city, such as Fairbanks, "may exercise all legislative powers not prohibited by law or by charter." There is no legislative enactment in Alaska that expressly prohibits a home rule city from making assignation a criminal offense. We do not find such prohibition from the fact that the Alaska legislature has extensively covered the field of sexual offenses. We believe there would have to be some additional factor from which the intent of the legislature to prohibit local regulation in this area could be reasonably inferred. We are not aware of any such factor in this case. We shall not pass further on the general subject of pre-emption by state law, because the subject is complex and has not been adequately briefed in this case.[226]

---

222 FAIRBANKS, ALASKA CODE § 6.301(a).
223 Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969).
224 58 Cal. 2d 99, 372 P.2d 879 (1962).
225 456 P.2d at 475.
226 *Id.*

The court thus rejects the California doctrine on the basis that the authority to act flows from different constitutional provisions. The essential difference as it applies to this case is that in California the exercise is permitted unless *in conflict with general laws*, while in Alaska the exercise is permitted unless *prohibited by law*. This would not be a substantial distinction unless the court believed that a conflict with general laws does not equate to a prohibition and that a prohibition must be found in order to invalidate a home rule municipal enactment. The court indicates in the quoted passage that a prohibition may be either a legislative enactment which expressly prohibits or a combination of factors from which legislative intent to prohibit can be reasonably inferred. As to pre-emption, the court indicates in its footnote 16 reference[227] to the Antieau position on pre-emption that it is less than enchanted with the doctrine.[228]

During the first decade of home rule in Alaska the court gave judicial approval to the concept of broad authority for home rule cities. In *Hixson* the court held that the exercise of home rule was limited by constitutional restrictions, but in *Lien*, statutes which were intended to serve as a grant of authority to general law cities were held not to constitute a limitation on the powers of a home rule city. The court clearly indicated in *Rubey* that to invalidate an exercise of home rule legislative power it must find either an express or clearly implied legislative intent to prohibit in order to invalidate a home rule legislative power and that a conflict does not necessarily constitute a prohibition. The *Maier* court approached the conflict problem by making an effort to harmonize the conflicting enactments, and was able to do so by finding that the purpose of each was different. The liberal approach of the court reflected in the above decision came to an abrupt halt in 1970 when the court handed down *Chugach Electric Association v. City of Anchorage*.[229]

B. *The Reversal—Chugach Electric*

The dispute in this case arose when the home rule city of Anchorage, which owned an electric utility that served the city, refused to issue a building permit to its competitor, Chugach Electrict, to extend its lines to a customer of the city's electric utility. The customer was within the service area of Chugach Electric as set forth in its certificate of public convenience and necessity issued by the state Public Service Commission which regulates all non-municipal electric utilities. The refusal to issue the permit was based on a determination that existing city-owned facilities were adequate

---

227 *Id.* at n.16.
228 *See* text accompanying note 188 *supra*.
229 Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115 (Alaska 1970).

to serve the area. The court believed that this "was tantamount to determining that the public convenience and necessity would not be served by the granting of the permit."[230]

The court stated the issue as "whether the state has implicitly carved out an area that is out of bounds to the city."[231] It then characterizes such an area "implicitly carved out" as a prohibition within the scope of the word "prohibit" as used in the constitutional grant of home rule power in Article X, section 11.

The case obviously presents an ideal vehicle on which to launch the doctrine of prohibition by implied pre-emption. In *Rubey* the court left the pre-emption question open on the basis that it would require something more than mere legislative activity in a field and indicated that the point would have to be more thoroughly briefed than it was in Rubey.[232] The *amicus* brief of the Attorney General in *Chugach*[233] convincingly urged a prohibition by implied pre-emption,[234] but the court registered its reluctance to adopt pre-emption as a solution,[235] and later stated that it approached

> a resolution of this problem by construing it as a conflict between the application of the municipal ordinance and the pertinent state statutes which vest power in the [Public Service Commission], rather than as a situation where the state has implicitly preempted the entire field. For this reason, our opinion today in no way clashes with our holding in *Rubey v. City of Fairbanks*.[236]

Of course there is no clash to the extent that both decisions reject pre-emption as a means of resolving conflict. Further, the court believes that in *Chugach* the conflict is with a statute while in *Rubey* the conflict arose by the implication of the absence of a statute. What the *Chugach* court overlooks when it states that *Chugach* "in no way clashes" with *Rubey* is that the *Rubey* court refused to equate a conflict with a prohibition[237] while here the court appears to be making such an equation.

In rounding out its posture toward the case the court notes that the legislature has not spoken to the problem in issue and it will therefore become the "responsibility of this court to resolve this problem in a manner which comports with our understanding of the

---

230 *Id.* at 116

231 *Id.* at 118.

232 456 P.2d at 475.

233 Brief of the attorney general as *amicus curiae*, Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115 (Alaska 1970).

234 *Id.* at 21-27.

235 476 P.2d at 120.

236 *Id.* at 121.

237 *See* text accompanying and following note 226 *supra.*

present laws of this state.[19]"[238] However, footnote 19 creates confusion for it cites a law review note which puts forth a policy supporting the authority of the courts to invalidate municipal ordinances "if the legislature is unwilling or unable" to do so.[239] The statement does not explain or support the court's understanding of present statutes. What it supports is the court's authority to invalidate municipal enactments when there is no statute. And, the qualification, or justification on the basis, that the legislature be "unwilling or unable" to act in the state interest is most questionable. In Alaska the legislature is not unable to prohibit a municipal ordinance, and in any case of unwillingness the court should find an intent not to prohibit. In either case, the author of the note invites the judiciary to assume a function with legislative overtones. It is a doctrine which is understandably embraced by the courts, but it is the doctrine which the drafters of the constitution and the Committee on Local Government specifically rejected because it produced such inconsistent and restrictive results.

When the court has finished the above preliminaries it displays a shocking lack of familiarity with any but the classical *imperium in imperio* home rule principles. At page 122 the court states:

---

[238] 476 P.2d at 121.

[239] Footnote 19 reads in its entirety:

> A concise statement of the problem confronting the court is set out in Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 747 (1959): "There is within a municipality no political pressure to check the enactment of ordinances adverse to the interest of the state, and if the state legislature is unwilling or unable to preclude municipal enactments, the judiciary is the only available protector of the state's interest."

The validity of this policy depends upon one's point of view. Dean Fordham, the Committee on Local Government, and others who support the legislative supremacy model for home rule would undoubtedly paraphrase the above quote in the following fashion:

> There is within the judiciary both too much animosity toward municipal enactments and an inadequate understanding municipal enactments and an inadequate understanding of local problems to check decisions adverse to the interests of the municipalities and their citizens, and if the legislature has not acted to give municipalities adequate powers the constitution should grant such powers and should protect the municipalities from judicial erosion of such powers.

When the above quote is read in context, the Alaska court's reliance upon it is doubly perplexing for the author of the note uses it to support his contention that it is "necessary, therefore, that courts be able to foreclose municipal legislation by holding the field preempted without express statutory guidance." (at 747) This is the concept rejected by the Alaska court in *Rubey*.

One last observation on the note: the author, insupport of the state-local test, concentrates almost exclusively on states with the classical *imperium in imperio* home rule. The only case cited from a legislative supremacy state is Dry v. Davidson, 115 S.W.2d 689 (Tex. Civ. App. 1938) which stands for the proposition that a general law is superior to a municipal enactment without regard to whether the municipal act concerns a local or state matter. The article therefore has no relevance to the interpretation of Alaska's home rule powers except to the extent that it reflects many of the problems of judicial interpretation of the state-local test that the framers of the Alaska constitution sought to avoid.

> Although the powers of home rule cities vary depending upon the bases for the grant of such power,[25] conflicts between statutes and municipal ordinances generally have been modulated by ruling in favor of the statutes. Many state courts, while not clearly enunciating the bases for their holdings, have in fact followed a rule which for sake of convenience can be referred to as the "local activities rule." [26] [240]

The court gets off to a bad start in the first phrase of the above quotation for it explains in footnote 25 that the different bases for home rule are constitutional and statutory. The only difference between the powers of a constitutional and a statutory grant is that no effective *imperium in imperio* can be created by statute. The difference in powers will depend not upon the type of document which contains the grant but upon the form the grant takes, *e.g.*, authority "to enact and enforce police regulations," authority "to adopt a charter for its own government," authority to assume "all powers of local self-government," authority to enact measures relating to all "local or municipal matters," the possession of "all legislative powers not prohibited," etc.

Nor does the court revive its stature in the next phrase for there it adopts a restrictive attitude, if not a full-fledged rule, against the validity of municipal ordinances. The expression the court uses parallels the terminal sentence in Dillon's Rule[241] that any fair, reasonable doubt is resolved by the courts against the corporation and the power is denied. But regardless of its similarity to Dillon's Rule it is clearly a restrictive, narrow approach to the interpretation of municipal powers—precisely the judicial approach the drafters of the local government article sought to avoid. The mandate of a liberal construction for powers of local government units[242] cannot be reconciled with this judicial pronouncement.

Having thus set the stage the court then adopts the "local activities rule" which it justifies on the basis of the weight of authority of other states. The *Minutes* and the *Proceedings* make it clear that the drafters looked to other states to determine what to avoid. The committee was warned that the Ohio home rule provision had been given restrictive interpretations, had produced endless litigation, and was a type to be avoided.[243] While the committee tried to avoid the Ohio type home rule (the classical *imperium in imperio*) in drafting the Alaska grant, the court cites three Ohio decisions as

---

[240] 476 P.2d at 122.
[241] DILLON, *supra* note 6.
[242] ALASKA CONST. art. X, § 1.
[243] PAS Studies at 25, 27.

examples of the local activity rule it is adopting to interpret Alaskan home rule powers.[244] The court also cites decisions from six other states with home rule grants quite different from Alaska's grant and, therefore, equally inapplicable to Alaska. The court is completely unconcerned over the glaring differences between the Alaska grant it is interpreting and the grants in the states it cites as authority for the "local activities test" it adopts. Even the error the court makes in stating that differences in home rule powers spring from the differences in the granting authority (constitution or statute) will not explain this disregard for differences for the court cites, in footnote 26, a Michigan decision based on a legislative grant while Alaska and the remaining states have constitutional grants. Thus the court disregards even differences it states exist.

After adopting the new rule the court reaffirms that the rule was not adopted for any reason associated with pre-emption, but,

> Instead, it is merely an *expedient* method for resolving an impasse between state statutes which seek to further a specific policy and municipal ordinances which either directly or collaterally impede this implementation.[245]

The court indirectly criticized other state courts for not clearly enunciating the bases for their holdings, but it is not itself to be criticized for failing to enunciate the base for its adoption of the local activities rule—it is clearly for judicial expediency. What is less clear is the qualification the court places on the type of statute which will invalidate a municipal ordinance. The court describes it as one which seeks to further "a specific policy." But as all statutes seek to further a specific policy the literal meaning is that *any* statute which conflicts with a municipal ordinance will invalidate the ordinance. Or does the court mean to distinguish specific from general policy? Is there an additional limitation that the policy be one of statewide concern? What sort of impasse? one where the impasse is at the policy level, or at the functional level? Numerous other questions which will eventually have to be answered are presented *supra*.[246]

The court found the activity to be one of statewide concern without casting any light on the question of how much statewide concern is necessary to find an activity to be of statewide concern. The court refers to the rule as the *local* activity rule. As it appears that there is a definite local interest in the city's action here, the rule must be that only in matters which are purely local will there

---

[244] 476 P.2d at 122 n.26.
[245] *Id.* at 122 (emphasis added).
[246] *See* text following note 109 *supra*.

be found to be no statewide concern. This assumption is strengthened in *Macauley v. Hildebrand*.[247] And as observed by the author of the law review note cited twice by the court, "Under [an "exclusively local"] test, the local enactment has seldom prevailed."[248] The court goes on to gild the restrictive interpretation lily by adopting an additional rule that where there is any doubt as to the characterization of the activity, the doubt will be resolved in favor of the legislative authority of the state.[249] This rule has the undeniable earmarks of Dillon's Rule which resolves all doubts against the municipality.

The degree of conflict or friction which will key the use of the local activities rule could range from detectable disharmony to head-on collision. The court illuminates the level of friction it finds impermissible in this case when it holds that it is only those parts of the ordinance which are "applied inconsistently with our state laws that must yield."[250] Mere inconsistency as a standard for impermissible conflict is itself another very restrictive rule.

The court concludes: "Our holding attempts to comport with the current trend of authority in dealing with problems of this nature"[251] and cites the law review note as authority for the current trend. The note, written in 1959, provides an excellent review of the trend in the majority of the home rule states at the time of the constitutional convention. As previously discussed, the Committee on Local Government also studied the then current trends in local government and unequivocally rejected the majority trend with its *imperium in imperio* generated state-local test.

C. *Compounding the Error—Macauley*

Macauley v. Hildebrand[252] carried the court's retreat from the constitution one step further. The conflict in this case began in 1964 when the Greater Juneau Borough, a non-home rule borough, asserted its authority to centralize the borough and school treasury management and to centralize borough and school accounting functions.[253] This conflict was settled the next year by the legislature in what became known as "the Compromise Bill" which provided that the borough could require centralized treasury management but that the

---

247 Macauley v. Hildebrand, 491 P.2d 120, 121 (Alaska 1971).

248 Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 741 (1959).

249 476 P.2d at 122-23, citing Abbot v. City of Los Angeles, 53 Cal. 2d 674, 349 P.2d 974 (1960).

250 *Id.* at 123.

251 *Id.*

252 491 P.2d at 120.

253 Greater Juneau Borough, Alaska, Resolution No. 23 (a copy of this resolution appears in app. B of CEASE & SAROFF, *supra* note 3).

school board had primary authority over its own accounting, although it could authorize the borough to include its accounting in a centralized accounting system.[254] In 1970 the Greater Juneau Borough and the two cities within the borough adopted a home rule charter which provided for a unification of the units local government.[255] The charter required the assembly to centralize accounting functions, including education,[256] which the assembly attempted to do by ordinance.[257] The school board refused to permit centralization of its accounting function, citing the failure of the city and borough to obtain the school board's consent in accordance with AS 07.15.330 (c). The city and borough responded that the statute was not meant to apply to home rule municipalities and as the legislature had not manifested its intent to prohibit with unmistakable clarity such an exercise of home rule legislative power was valid.[258]

In *Chugach,* the court rejected the city's contention that each piece of legislation that restricts the powers of a home rule city should be specifically labeled as so doing. The court claimed that it was not its place to dictate the form of legislative enactments and found it "unnecessary for the legislature to spell out the supposed effect of its legislation each time it produces a new bill."[259] The city and borough, in *Macauley,* recognized this holding and, because the statute in question in *Chugach* was one which did not deal with municipal powers, urged that a failure to prohibit when the legislature was dealing specifically with powers of a municipality was strongly indicative of an intent not to prohibit.[260] The court was not impressed by the distinction and rejected it on the basis that the question had been settled in *Chugach.*[261] The legislature, then, to indicate that an act does *not* restrict a home rule municipality must specifically so indicate. This appears to be a restriction on the rule found in *Lien* that a statute granting authority to a general law municipality is not a limitation on home rule powers, but the court restricts the *Lien* rule by interpreting *Lien* as a case involving "a matter of purely local concern."[262] In looking to *Lien, Chugach* and *Macauley* to answer the question, How does the legislature indicate that an act which is clearly applicable to municipalities is not applicable to home rule municipalities? one is forced to conclude that the court has said that the legislature must indicate specifically. This

---

254 Session Laws of Alaska, Chapter 82 (1965); AS 07.15.330 (b), (c) (1970); CEASE & SAROFF, *supra* note 3, at 200.
255 City and Borough of Juneau, Alaska, Home Rule Charter.
256 *Id.* § 9.13(e).
257 491 P.2d at 121.
258 Brief for Appellee at 11, Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971).
259 476 P.2d at 120.
260 Brief for Appellee, *supra* note 258, at 11.
261 491 P.2d at 122, n.4.
262 *Id.* at 120.

conclusion, however, is in conflict with the court's claim that it will not dictate the form of legislative acts.[263] This untenable rule was immediately reversed by the legislature insofar as it applied to the municipal code. So much of the *Chugach* rule that prohibitions need not be specific as affected the municipal code was also reversed.[264] While the legislature has acted to restore some of the rights which the court took from home rule municipalities, it does not change the fact that it was the court which imposed the restrictions in clear violation of the constitution's liberal construction mandate. This situation bears out the conclusion of the Committee on Local Government that of the two, the legislature will treat the powers of local government with greater liberality than the court.

The appellee relied on *Lien*[265] to support its position that AS 07.15.330(c) was not applicable to home rule municipalities. The court disposed of *Lien* by distinguishing it in the process of reinterpreting it, stating:

> In *Lien v. City of Ketchikan*, we recognized that under the Alaska Constitution home rule municipalities have broad governmental powers and refused to void a lease of municipal property even though the city had not complied with a general state statute regarding such leases. *Lien*, however, dealt with a matter of purely local concern . . .[266]

The characterization of the activities in *Lien* as "purely local" confirms the implication in *Chugach* that a statewide concern will be found unless the matter is exclusively of local concern. *Lien* did not mention, recognize, decide or turn on whether the activity involved was local, much less purely local. *Lien* was not a conflict case either, for the court decided that the statutory provision the appellant sought to invoke was not applicable. There can be no conflict with

---

263 The court's claim is patently incorrect anyway. In many cases where the court adopts a rule of statutory construction it is communicating to the legislature that a certain form will indicate a specific legislative intent, and by implication, if a different intent is to be effected a different form must be used.

264 The revised municipal code was enacted in the next legislative session following *Macauley*. AS 29.13.100 of the new code provides that "Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided." This creates not just the strong indication of an intent not to prohibit which the city-borough was unsuccessful in urging the court to adopt but a legislative statement that as to Title 29 of Alaska Statutes there is no prohibition where the legislature has not specifically prohibited home rule action in the form prescribed by the AS 29.13.100. This section also reverses the court's holding in *Chugach* that a prohibition need not be specific, but reversal applies only to statutes in Title AS 29. The Supplemental Report to Free Conference Committee Report on SCS CSHB 208 am S and CSHB 208 am (Revised Municipal Code) at 3 (June 16, 1972) states that the section "makes explicit the legislative intent as to which provisions of the code apply to home rule municipalities, as prohibitions . . . and which do not." Time will tell whether the legislature was more effective in speaking to the court than were the drafters of the constitution.

265 The *Lien* decision is discussed in the text accompanying notes 208-17 *supra*.

266 491 P.2d at 121.

an inapplicable statute. But assuming that the court were to have to characterize as statewide or purely local the leasing of a hospital built with federal, state and local funds, the operation of which must meet state determined minimum standards and federal requirements, as in *Lien*,[267] then considering these factors and the general interest of the state in health matters, it is difficult to see how a court could hold that there is no doubt that there is no statewide interest in the leasing of this type of municipal property. Even if there is no consideration of the function of the property, recognition of the municipal trustee principle[268] that the city holds property for all the citizens of the state would remove leasing of municipal property from the category of purely municipal.

What is particularly inconsistent in the above quotation is that just prior to declaring that *Lien* dealt with a matter of purely local concern, the court states that in *Lien* they recognized Alaskan home rule municipalities have *broad governmental* powers. First, *broad* powers of any sort do not equate to powers limited to those of purely local concern. Second, *governmental* powers are in juxtaposition to proprietary powers, and when used in the context of a home rule state-local test the *governmental functions* and *state concerns* are lumped together in opposition to *proprietary functions* and *local concerns*.[269] When the court says that it recognized *broad governmental* powers to deal with *purely municipal* concerns it displays a lack of understanding of the relationship and meanings given these words by the courts of the states to which it looked for the "current trend of authority" or it has made a careless error. The court reinforces the first possibility when it states in footnote 4[270] that home rule municipalities do *not* have "broad power in areas not strictly of local concern." But a broad power, governmental or otherwise, in matters which are strictly or purely local (*i.e.*, no statewide interest) is an illusory power at best. As pointed out by the author of the law review note upon which the court relied in *Chugach*,[271]

> Even in those matters most intimately connected with municipal government, however, there is necessarily *some* statewide effect. A test that looks only to the existence of some state interest as a basis for declaring an ordinance which conflicts with a statute invalid renders it almost impossible to reach a decision in favor of the ordinance.[272]

---

[267] 383 P.2d at 722-23.

[268] City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745 (1932), discussed in text accompanying note 49 *supra*.

[269] *See* note 21 *supra* and text accompanying notes 17-22; City of Arlington v. Lillard, 294 S.W. 829, 830 (Tex. Sup. Ct., 1927).

[270] 491 P.2d at 122.

[271] 476 P.2d at 121, n.16 & at 123, n.28.

[272] Note, *supra* note 248, at 742.

The author of the law review note criticizes this standard and points out that, "A more realistic test would weigh the state's interest against the advantages of local autonomy."[273] This balancing of interests is the policy the *Chugach* court purports to adopt when it cites the note and explains its holding as one which "attempts to comport with the current trend of authority" and to seek "to balance the needs of the entire state against the desirable autonomy which only home rule can provide."[274] Even though *Chugach* appeared to have adopted a purely local rule, the above policy would indicate that there was no intention to do so. The *Macauley* adoption of this standard clearly violates the policy of balancing interests, for as soon as the court finds *any* statewide interest the inquiry as to validity of an inconsistent municipal act is at an end. In addition the purely municipal standard is the most restrictive application of the already restrictive state-local or local activities rule, and as such is an approach which hardly comports with a liberal construction of the powers of local government units mandated by the constitution.

One more substantive statement the court makes in *Macauley* is either a product of careless imprecision or manifests what many must already suspect—that the court has abandoned the constitution as the basic law governing home rule powers. At page 122 the court states the rule:

> Thus, the determination of whether a home rule municipality can enforce an ordinance which conflicts with a state statute depends on whether the matter regulated is of statewide or local concern.[275]

This is the classical statement of the state-local test in the classical *imperium in imperio* environment and brings to focus the inapplicability of the rule in Alaska. The rule as stated by the court unequivocally provides that where there is a state-local conflict in a matter of local concern (purely local in Alaska) the local home rule act is valid in spite of the conflicting state act. Literally, and in the classical setting, the home rule act of local concern supersedes the state act; there is a *sphere of protection from state legislative interference*. If the court has adopted this essential part of the rule it would appear that an Alaskan home rule municipality could act in spite of a legislative prohibition against such an act if it were an act of purely local concern. Assuming the court would follow the lead of other states in classifying various activities as purely local or not leads one to the assumption that in Alaska municipal elections

---

[273] *Id.*

[274] 476 P.2d at 123.

[275] 491 P.2d at 122.

are purely local matters.[276] Assume that a home rule municipality holds a municipal election and appoints only two election judges for each polling place. By statute, a home rule municipality is specifically prohibited from failing to comply with the statute which requires that at least three election judges be appointed.[277] Given this situation in an *imperium in imperio* home rule state it is clear that the home rule municipality would not be bound by the specific prohibition. If the Alaska court has adopted the heart of the local activities rule the same result will occur in Alaska. But the statutory prohibition meets the requirement of prohibition by law provided for within the constitutional grant of home rule. The court appears to have created an unholy mixture of the worst of each world within which it will restrict home rule powers.

There are three areas of interest within which state and local governments could take action: purely local, mixed state and local, and purely statewide. In which areas may an Alaskan home rule municipality validly act without statutory authorization to do so, and in which areas may it validly act in conflict with a statute? Waiving as improbable under the present court the idea that home rule municipalities have any authority to act in a purely statewide area without a specific delegation, we are left with the mixed area and the purely local area. With or without the court's distortion of *Lien*, that decision stands, as a minimum, for the proposition that a home rule municipality may act without a specific delegation of authority in purely municipal areas, assuming for the moment the exercise has not been specifically prohibited. That leaves the mixed area undecided. Some help in the answer to the question about this area appears in footnote 4 in the *Macauley* opinion where the court states that it has already rejected the argument that a home rule municipality has broad powers in areas not *strictly* of local concern.[278] Thus, if a home rule municipality has any power in the mixed state-local interest area it is not a broad power, hence, it must be a narrow power. Two degrees of narrowness are possible; first, only those powers delegated, and second, any power within the mixed area

---

[276] Strode v. Sullivan, 72 Ariz. 360, 236 P.2d 48 (1951) cited in *Chugach*; the law review note relied upon by the *Chugach* court states that: "Municipal elections have perhaps been considered 'exclusively local' more often than any other matter." Note, *supra* note 248, at 741.

[277] Alaska Statutes (1972):

AS 29.28.010(a) The . . . council shall . . . appoint three judges for each polling place.

(b) This section applies to home rule and general law municipalities.

AS 29.13.100 [The following provisions] supersede existing and prohibit future home rule enactments which provide otherwise:

(1) . . .

(8) AS 29.28.010 . . . (municipal elections) . . . .

[278] 491 P.2d at 122.

so long as there is no inconsistency with a state enactment. The first is Dillon's Rule which conflicts with the liberal construction mandate. The second possibility receives the implied support of *Chugach*. Assuming that there is some local interest in prohibiting the operation of an independent electric utility within a city which owns its own electric utility, *Chugach* would then be a case of mixed interests. The court implies that if there had been no conflict with state statutes the action of the city could not have been challenged. *Rubey* was a case of mixed interests as both the state and local unit regulated sexual conduct, however the court did not address itself to the question of whether a conflict existed, but rather whether there was a prohibition. *Maier* was also a case of mixed interests if, as seems reasonable, the state has some interest in the way a municipality limits the rights of a state citizen to bring a tort suit. The court there found no conflict and permitted the local act to stand. Therefore, it seems clear that a home rule municipality has authority to act without a specific delegation in both the purely local and in the mixed area of interest. In the mixed area of interest it may act if there is neither a legislative prohibition (per the constitution) nor an inconsistency between its act and a state law (per the local activities rule). In the purely local area the home rule municipality may act in conflict with a statute (per the local activities rule) so long as there is no specific prohibition (per the constitution).

For the foregoing analysis to stand there must be two levels of friction, a prohibition, and a conflict. But "conflict" establishes little in the way of a quantitative measure. The court, in *Chugach*, used "inconsistency" as the measure of impermissible conflict when a mixed interest was at stake. The court, however, has not had before it a conflict case of purely municipal concern since it adopted the local activities rule. The question that now arises is, how much conflict will the court allow within the purely local area? A head-on conflict in the form of an act specifically prohibited to home rule municipalities would not be allowed under the constitutional restraint. But some level of conflict between inconsistency and head-on collision must be established by the court. Because a third level of conflict would make decisions on the validity of the exercise of a home rule power even less predictable than they are now, it is suggested that the line should be drawn at the prohibition level. This will serve to preserve some measure of local initiative to home rule municipalities.

Actually the question of where the line of impermissible conflict should be drawn in the purely local area conflict cases is moot. First, the ambit of the *purely local* area is so narrow as to raise a serious question as to whether such an area actually exists outside of the

generous whims of the court. Second, any statute dealing with matters of purely local concern will almost certainly become a part of the municipal code which establishes a requirement for a specific prohibition for any limitation that the code makes on home rule powers.[279]

D. *A New Court, A New Rule?*

That the court made a radical deviation, if not a reversal, from the line of home rule decisions which preceded *Chugach* will not be denied, except by the court. There was no clue or hint in any of the pre-1970 decisions which signalled that such a change might be forthcoming. Two elements of a non-legal nature may have contributed to the change, one being a general attitude of the courts that in the fields of utilities regulation and education the state interest is so great as to allow no possibility of local action in the area, and the other being a substantial change in court personnel.

Speculation as to the effect of judicial bias will not be made here. As to the change in court personnel, a chart which appears as Appendix 1 shows which justices authored and were on each of the home rule opinions discussed. The first supreme court in Alaska was a three man court. The five decisions which comport with constitutional intent were written by this court although there was a minor change of personnel in the *Maier* and *Rubey* cases. Justices Nesbett and Dimond were the only members of the three man court to hear all of the first five cases discussed and it was these two men who authored the first five opinions. Justice Dimond authored the three most affirmative opinions, *Lien, Maier* and *Rubey*.

By the time *Chugach* was heard the court had been expanded to five justices, and Justice Nesbett was no longer on the high bench. Justice Dimond was the only carryover to the expanded court who had been on a significant number of the preceding home rule cases. Justice Rabinowitz was a carryover to the *Chugach* court, but he had heard only *Rubey* and had dissented on grounds other than home rule. Thus the *Chugach* court, except for Justice Dimond, had had little or no experience with the prior home rule cases. Justice Connor, who authored the *Chugach* decision, had a nonjudicial contact with the *Maier* case. He was the attorney for the appellant who unsuccessfully urged the court to apply a governmental-proprietary limitation on the claims notice provisions of the Ketchikan charter and to find the notice provision void for a conflict with state law.

---

279 *See* note 260 *supra.*

Justice Erwin who authored the *Macauley* opinion had heard none of the preceding home rule cases.

A weakness in the suggestion that the change in attitude is attributable to substantial change in personnel is that Justice Dimond, who was on all seven opinions, and who authored the three most affirmative opinions, did not register a dissent or separate concurrence in either *Chugach* or *Macauley*.

IV. Summary and Conclusion

Home rule began as a movement to bestow upon cities a constitutionally secured sphere of exclusive competence to deal with their own affairs. The grants of home rule were most often made in undefined terms such as "local self-government" or "municipal affairs." The courts of the various states with such grants universally adopted a state-local interest test to determine the validity of a local act which conflicted with a state act. Where the local act concerned a matter which was sufficiently local in nature the local act superseded all state acts in conflict therewith. This form of home rule created an *imperium in imperio*. Some home rule grants were interpreted to constitute a general grant of power to act in certain areas, though not the power to act contrary to the laws of the state. This latter function of home rule served to reverse the restrictive effect of Dillon's Rule.

However, the courts in applying the state-local test were unable to establish any standards which they could apply in making what is actually a political/legislative decision involving a division of powers. This problem, combined with a basic attitude of the courts, which some regard as one of hostility toward local autonomy and which others regard as a result of a bench and bar which lack an appreciation and understanding of local needs, resulted in opinions construing home rule powers which were unpredictable, inconsistent, highly restrictive, and result oriented. The adherents of home rule then began to see the court as the culprit and focused their efforts on limiting the role of the courts. One approach was to make the classical *imperium in imperio* grant, but include a specific, but non-inclusive, enumeration of functions which were local in nature. This is the approach which was taken by Colorado and adopted by the National Municipal League in its 1948 model state constitutional provisions.

In Texas, under the hands of a benign court, a third approach to home rule developed. The constitutional grant of authority to adopt a charter was not limited by the usual phrases such as "for its own

local self-government." Instead the limitation was that the charter and ordinances adopted thereunder must not be inconsistent with general laws. This was interpreted by the Texas Supreme Court to mean that home rule cities possessed *legislative* powers as broad as those of the state legislature, but that no *imperium in imperio* had been created. The Texas court in the legislative supremacy approach to home rule it created, had reduced its role to the perfunctory inquiry of whether the power in question was one the state legislature could have undertaken and to the procedural inquiry of whether the local act was inconsistent with a general law. The Texas approach was modified in a proposal by Dean Jefferson Fordham to a grant of any legislative power not *denied* by law, but denied the power to enact civil law unrelated to a municipal function. Fordham's proposal was published by the American Municipal Association in 1953 as a model constitutional home rule provision.

The delegates to the Alaska constitutional convention in 1955 were warned of the failure of the classical *imperium in imperio* approach to home rule because of the inability or unwillingness of the judiciary to deal with the problems of allocating powers to local governments in any other than a restrictive manner. The advisors to the convention delegates recommended the *imperium in imperio* approach coupled with a non-inclusive specific enumeration such as the NML model. The committee which drafted the Local Government Article stated that it had studied the forms of government in other states with the idea of learning what not to do. It believed that the NML model did no go far enough in its grant of functionally limited powers and adopted instead the Texas approach of a broad grant of legislative powers. The home rule grant adopted by the convention was one of all legislative powers not prohibited by law or charter. No other limitations were included. The grant was thus greater than that of either Texas or the AMA model. The committee had sought to provide the maximum power and flexibility to local units of government to deal with the full spectrum of problems which affect them. It sought to minimize the restrictive role of the court in the determination of local government powers by (1) the specific repudiation of Dillon's Rule, (2) the use of a broad grant of *all* legislative powers which is limited not by the judicial application of a state-local interest test but by action of the state legislature, and (3) by requiring clear legislative action in the form of a prohibition in order to limit local acts; inconsistency was not enough, only a specific denial or withdrawal of a power would suffice as a prohibition.

That the delegates had created something new is reflected in the statement made by a delegate to the convention who was also secre-

tary to the committee which drafted the grant that it would be wrong for the court to look to other states in interpreting the Alaska home rule grant. Commentaries on and non-judicial interpretations of the home rule provision made in the years following statehood uniformly agreed that the grant was broader than that of any other state, was not of the *imperium in imperio* variety, and therefore provided no sphere of immunity from legislative interference which was in the form of a prohibition.

In the ten years that followed statehood the court refrained from seeking guidance from other states in the interpretation of its home rule grant, and in the *Lien, Maier* and *Rubey* decisions displayed an understanding of the intent of the constitutional provision. These three decisions set a pattern of broad, constitutionally based home rule powers and of a liberal judicial construction of home rule powers. However, in *Chugach*, a case which followed a substantial change in court personnel, the court reversed both patterns. It adopted the state-local test, which it denominated the "local activities rule," with the result that where any statewide interest is at stake a state statute which is inconsistent with an ordinance of a home rule municipality will constitute a prohibition.

The court in adopting the rule which the framers of the constitution had rejected justified itself on the simplistic bandwagon approach to judicial interpretation—the "current trend of authority." To compound its error the court even cited as examples of the rule decisions from a state which had been pointed out to the committee and convention as an example of what to avoid.

The court reaffirmed its retreat from the constitution in *Macauley* when it clearly limited the meaning of local activities to *purely* local activities. Purely local activities, *i.e.*, those not touched by *any* state interest, are extremely limited, if, indeed, any exist at all. But the court, in a burst of inane generosity, conceded recognition of broad home rule governmental powers in matters of purely local concerns. The result is that now a home rule municipality in Alaska may act in areas of mixed state and local concern so long as its acts are not inconsistent with state statutes. If it can find an area of *purely* local concern it may exercise its broad governmental powers by acting in conflict with those statutes which are not intended to apply to home rule municipalities.

Home rule in Alaska as construed by the court is hardly worthy of the name. Of those states which purport to have constitutional home rule, Alaska must be placed among the weakest. The court's violation of clear constitutional intent coupled with its manifest restrictive attitude toward local government leaves little hope that

home rule in Alaska will be restored to its proper status by the court. Short of a constitutional amendment, the only solution may be restoration by the legislature.

What the framers of the constitution had though was a bold, new approach to home rule, one which created a strong and forward-looking home rule structure, the court has converted into a weak, common, regressive form of home rule plagued by all the difficult questions the framers sought to avoid in addition to questions created by the new grant. In the 49th state a mere constitution is ineffective to purge local government law of the pervasive influence of Judge Dillon's restrictive rule and transfer political decision making from the court to the legislature.

APPENDIX 1

	Hixson	Lien	Brayton	Maier	Rubey	Chugach	Macauley
Nesbett	**	*	**	*	*		
Dimond	*	**	*	**	**	*	*
Arend	*	*	*1				
Hepp				*			
Rabinowitz					*1	*	*
Connor						**	*
Taylor						*	
Stewart						*	
Boney							*
Erwin							**

1 Dissenting on basis other than home rule.
* On the opinion.
** Author of the opinion.

Appendix D

Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska Law Journal 232, 239 (1970)

Blank page

DELINEATION OF THE POWERS OF THE ALASKA HOME RULE CITY: THE NEED FOR A BEGINNING

In the recent case of **Rubey v. City of Fairbanks,** 1 the Alaska Supreme Court sidestepped an opportunity to delineate the scope and operation of the home rule provision in Alaska Const. art. X, section 11. 2 However, the argument made in the **Rubey** case is a harbinger of difficult issues of state preemption which the Court must eventually face.

Twyla May Rubey was convicted under a Fairbanks city ordinance making "assignation" 3 a misdemeanor. She argued, on appeal to the Supreme Court, that since the Alaska Legislature had comprehensively regulated the field of sexual behavior, it had "preempted" the city's right to penalize sexual behavior not sanctioned by state statute. The foundation for this argument was the California case of **In re Lane** 4 in which the California Supreme Court invalidated a Los Angeles Municipal ordinance prohibiting "resorting" 5 on preemption grounds. The state preemption found in the **Lane** case resulted from comprehensive regulation of the field of sexual behavior by the state. Such regulation, the Court felt, indicated an intention on the part of the legislature not to penalize conduct left unsanctioned. The existence of the local ordinance thus created a conflict with state law. In the event of a conflict between the state

---

1. 456 P.2d 470 (Alaska 1969).

2. **Alaska Const.** art. X, section 11 provides that "(a) home rule borough or city may exercise all legislative powers not prohibited by law or by charter."

3. **Fairbanks, Alaska, City Code** section 6.301(a)(1). Assignation is defined as " . . . the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement."

4. 58 Cal. 2d 99, 372 P.2d 897 (1962).

5. **Los Angeles, Calif., Municipal Code** section 41.07 (1955). "No persons shall resort to any office building or to any room used or occupied in connection with, or under the same management as any cafe, restaurant, soft-drink parlor, liquor establishment or similar businesses, or to any public park or to any of the buildings therein or to any vacant lot, room, rooming house, lodging house, residence, apartment house, hotel, housetrailer, street or sidewalk for the purpose of having sexual intercourse with a person to whom he or she is not married, or for the purpose of performing or participating in any lewd act with such person."

statute and the local regulation, the latter must fall in accordance with the provisions of Calif. Const. art. XI, section 11. 6

It is clear that the Alaska Supreme Court rejected Rubey's argument that the Fairbanks ordinance was invalid; whether the **Lane** doctrine of preemption by occupation of the field was also rejected is not as clear. The court refused to consider the general subject of preemption by state law 7 and discounted the striking similarity between the **Lane** and **Rubey** cases by noting that the wording of the Alaska Constitutional provision differs from its California counterpart. 8

As the Court properly noted, the language of the two constitutional provisions is different. However, that difference alone does not compel rejection of the preemption doctrine represented by **Lane** without a thorough consideration of the nature of the home rule power in Alaska. It is, therefore, the purpose of this paper to analyze the meaning of Alaska home rule provisions in order to develop a doctrinal basis for solution of future cases, such as **Rubey,** which raise potential preemption problems.

I. The Scope of the Home Rule Power

Both constitutionally and statutorily, the Alaska home rule city or borough 9 may exercise "all legislative powers." 10 The Alaska Constitution further mandates that a "liberal construction" shall be given to the powers of local government units in order to maximize local self-government. 11

The delegation of all legislative powers to a home rule city is uncommon. Typically, the grant of power is couched in terms of power to deal with local af-

---

6. **Calif. Const.** art. XI, section 11 provides that "(a)ny county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws." See text accompanying note 25 **infra** regarding local supremacy in local affairs.

7. "We shall not pass further (except to uphold the ordinance) on the general subject of preemption by state law, because the subject is complex and has not been adequately briefed in this case." 456 P.2d at 475.

8. **Compare Alaska Const.** art. X, section 11, **supra** note 2 **with Calif. Const.** art. XI, section 11, **supra** note 6.

9. A home rule city is one which has adopted a home rule charter. **Alaska Stats.** section 07.35.020 (1965); **Alaska Stats.** section 29.05.010 (1962). Pursuant to **Alaska Const.** art. X, section 9, any borough or city of the first class may adopt such a charter. The procedure for adoption, amendment or repeal may be established by the legislature, or in the absence of action by that body, by the governing body of the first class city or borough. All cities and towns incorporated as first class cities before March 26, 1955, or organized and operating as cities before March 24, 1951, are first class cities. **Alaska Stats.** section 20.10.003 (1962). A community with 400 or more permanent inhabitants may incorporate as a first class city. **Alaska Stats.** section 29.10.006 (1962). A first class borough is a general law borough. **Alaska Stats.** section 7.35.010 (1962).

10. **Alaska Const.** art. X, section 11; **Alaska Stats.** section 7.35.020 (1962); **Alaska Stats.** section 29.05.020 (1962).

11. **Alaska Const.** art. X, section 1 cited with approval in **Fairview Public Util. Dist. No. 1 v. City of Anchorage,** 368 P.2d 540 (Alaska 1962).

fairs and, consequently, often limited thereto. 12 The so-called "local affairs limitation" carries with it the attendant problem of determining what is and is not a local matter. This is, of course, a difficult determination at best. A good illustration of the judicial struggle to decide what is a local affair may be seen in the varying treatment of the subject of the employment and discharge of municipal employees, especially police and fire personnel. Many cases hold such problems to be of local concern, 13 while others hold them to be of state-wide interest. 14 Often the decision is a boot strap operation with the court automatically equating state legislative action with a defination of state-wide concern. Such restrictions unduly hamper local initiative in meeting local problems where the legislature has not acted, as well as deny the opportunity to supplement state regulation with local ordinances tailored to special local needs.

Even if more precise standards for distinguishing the local affair from the state concern could be developed, other complicating factors are present. Obviously, many subjects are appropriate for concurrent state and local regulation. The legislature may wish to set forth a general or minimum standard applicable throughout the state though local conditions make varying supplemental regulation appropriate and desirable. 15 If, however, the local aspect of a problem is deemed to vanish because of co-existing state aspects, complimentary municipal regulation would be precluded.

Additionally, in a changing society, the nature of various enterprises may be altered in a way which fairly transforms its regulation or licensing from a matter of local concern to a matter of predominent state concern. Such dynamics have been specifically recognized in **Pacific Tel & Tel. Co. v. City and County of San Francisco.** 16 In that case, the California Supreme Court refused to follow a 1911 decision holding that home rule cities had autonomous power over the granting of franchises for telephone service. 17 The court expressly based its ruling on the changed nature of telephone service. 18

Finally, the local affairs limitation may stand as an impediment to local initiative. If a matter is not a local affair, even though the legislature has not addressed itself to the problem, the city may lack power to deal with it regar-

---

12. See, e.g., Calif. Const. art. XI, section 11; Colo. Const. art. XX, section 6; Idaho Const. art. XII, section 2; Ohio Const. art. XVIII, section 3; Wash. Const. art. XI, section 11. See generally Vandlingham, Munici-Home Rule in the United States, 10 Wm. & Mary L. Rev. 269 (1968) (hereinafter cited as Vandlingham).

13. See, e.g., Jackson v. Wilde, 52 Cal. App. 259, 198 P. 822 (1921) (local ordinance fixing firemen's compensation); State ex rel Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958) (selection of police officers contrary to procedure prescribed by state civil service statute).

14. State ex rel Everett Fire Fighters v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955); City of Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941); Dry v. Davidson, 115 S.W.2d 689 (Tex. Civ. App. 1938).

15. This situation was specifically recognized in State v. Poynter, 70 Ida. 438, 220 P.2d 386 (1950).

16. 51 Cal. 2d 766, 336 P.2d 514 (1959).

17. Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796 (1911).

18. 51 Cal. 2d at 771, 336 P.2d at 517.

dless of its impact on the community. A broad grant of power to the home rule city obviates this obstacle by permitting the city to deal with any topic which is a source of local solicitude.

The history of Alaska Const., art. X, section 11 indicates that the draftsmen sought to avoid the interpretive difficulties encountered in other jurisdictions as well as provide an opportunity for maximum ocal initiative and creativity. **19** Therefore, the Alaska home rule provision was drafted to embody the home rule theory developed in Texas. Under the "Texas plan" a chartered city has any power "constitutionally available to the state legislature" until the legislature prevents the exercise of that power by law. **20** The decisions involving the exercise of the home rule power in Alaska have confirmed the breadth of local authority. **21**

II. Restrictions on Local Legislation

Although the Alaska home rule provision is unusual in the delegation of broad authority to local units, it forbids the use of that power where "prohibited by law or by charter." **22** Thus, like a number of other states, **23** it has made the legislature supreme by placing it in a constitutional position to prohibit certain local action. This subordinating power of the state legislature has two limitations: it may not be used to prohibit the exercise of local government powers, and it must be used in a prohibitive manner.

A. Extent of State Supremacy

The celebrated **Dillon's Rule 24** in local government law stated that the city was a mere creature of the state, deriving its powers wholly from the legislature

19. **Alaska Legis. Council & Local Affairs Agency, Final Report on Borough Government** 36 (1961).

20. **Id.** at 37. The Texas home rule provision is found in **Texas Const.** art. XI, section 5. It should be noted that Texas courts have held that the legislative powers of the Texas home rule city derive directly from the Constitution and are not dependent on the enabling act of the legislature. Dallas Co. Water Control & Imp Dist. No. 3 v. City of Dallas, 149 Tex. 362, 233 S.W.2d 291 (1950); City of Houston ex rel City of W. Univ. Pl., 142 Tex. 190, 176 S.W.2d 928 (1943). However, it is not accurate to say that Texas home rule cities may exercise any power constitutionally available to the legislature. Two Texas cases have stated that home rule cities have power only with respect to matters of local concern. City of Amarillo v. Tutor, 267 S.W. 697 (Tex. Comm. App. 1924) and Green v. City of Amarillo, 244 S.W. 241 (Tex. Civ. App. 1922). Although these cases have not been overruled, later decisions indicate that the home rule power in Texas is broad. **Compare** Keith, **Home Rule Texas Style**, 44 **Natl. Mun. Rev.** 184 (1955) **with** Ruud, **Legislative Jurisdiction of Texas Home Rule Cities**, 37 **Tex. L. Rev.** 682, 687-89 (1959) (hereinafter as **Ruud**).

21. Brayton v. City of Anchorage, 386 P.2d 832 (Alaska 1963); Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963); City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962); Fairview Public Util. Dist. No. 3 v. City of Anchorage, 368 P.2d 540 (Alaska 1962).

22. **Alaska Const.** art. X, section 11.

23. **See, e.g., Calif. Const.** art. XI, section 11; **Texas Const.** art. XI, section 5. **See generally Vandlingham** at 283-288.

24. **Dillon, Municipal Corporations** 239 (5th ed, 1911); **C. Antieau, Municipal Corporation Law** section 2.00 (1968).

and subject to extensive control by, as well as interference from, that body. Therefore, the dual goals of the home rule movement were to secure a constitutional source of power and constitutional protection from interference in local affairs by the legislature in amelioration of **Dillon's Rule.** In states where home rule or "local control" was gained by constitutional amendment, cities immediately sought a determination of the scope of local control. If the constitutional grant carved out an area of exclusive local control, conflicting or impinging state laws would yield to local enactments. Generally, court determination of this issue depended on the specific wording of applicable constitutional provisions.

In California, charter cities are empowered to make laws with respect to "municipal affairs" subject only to restrictions contained in their charters. **25** State laws regulating purely local affairs have been ruled unconstitutional on this ground. **26** Ohio constitutional provisions granting municipalities "all powers of local self-government" **27** subordinate conflicting state laws to an ". . . ordinance passed by charter city which is not a police regulation . . . (and which) deals with local self-government." **28** On the other hand, in Washington, where the constitution contains only a grant of power to all cities to make ". . . all such local police, sanitary and other regulations as are not in conflict with the general laws," **29** cities have been subjected to detailed state control of local affairs. **30** The Texas constitutional provision granting home rule specifically mandates that local regulation be "consistent" with the general laws. **31** The legislature may, therefore, intervene in purely local affairs provided it does so on a uniform basis. **32**

Art. X, section 2 of the Alaska Constitution vests "(a)ll local government powers" in boroughs and cities. Art. II, section vests the "legislative power of the State" in the legislature. Under traditional thinking, i.e. **Dillon's Rule,** control of local government would be part of the legislative power of the state. The Alaska Constitution may be read to revest this power over local government

---

25. **Calif. Const.** art. XI, section 6.

26. E.g., City of Pasadena v. Charleville, 215 Cal. 284, 10 P.2d 745 (1932); **26 Calif. Ops. Atty. Gen.** 210 (1955). **But see** Professional Firefighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d 158 (1963) as an example of the shifting content of "local affairs."

27. **Ohio Const.** art. XVIII, section 3.

28. Leavers v. City of Canton, 1 Ohio St. 2d. 33, 203 N.E.2d 354, 356 (1964). **See also** State ex rel Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

29. **Wash. Const.** art. XI, section 11.

30. Trautman, **Legislative Controls of Municipal Corporations in Washington, 38 Wash. L. Rev.** 743 (1963). It should be noted that an identical grant of power to make local regulations not in conflict with general laws is contained in the California and Ohio Constitutions. The distinguishing factor appears to be coupling this grant with other permissive language such as "all powers of local self-government."

31. **Texas Const.** art. XI, section 5.

32. **Ruud** at 688.

in cities and boroughs and thus remove it entirely from the hands of the legislature. It is significant that Art. X, section 2 vests the powers of local self-government in cities and boroughs regardless of the adoption of a home rule charter. This supports the contention that the constitution reassigns local government power in toto and creates a sphere of local operation upon which the state may not encroach even in the case of general law cities. Therefore, the legislature may never prohibit the exercise of a local government power by a home rule city.

B. The Mechanics of Prohibition

Local legislative action is forbidden in most states when it is "inconsistent with" **33** or "in conflict with" **34** state law. The Alaska home rule provisions subordinate local action when it is **prohibited** by law. It is contended that a requirement of consistency represents a more stringent control on local regulation than the conflict standard. **35** This rests on an assumption that the former implies harmony, rather than a mere absence of repugannce. The courts, however, have used the terms interchangably. Prohibition can be viewed as an even looser control of local action since it implies a necessity for affirmative undertaking on the part of the legislature.

Consequently, it may be argued that the legislature must affirmatively and expressly restrict the operation of specific local powers. **36** The Alaska Legislature has taken this kind of action to limit the power of home rule cities to tax, **37** to regulate the use and operation of motor vehicles, **38** to inflict criminal penalties for violation of uncodified ordinances, **39** and to regulate fireworks. **40** However, a number of persuasive considerations refute this unduly restrictive interpretation of the mechanics of legislative prohibition.

Initially, it is apparent that some implied restrictions on local action do exist. The vehicle for prohibition is "law." Law, of course, includes the United States Constitution since it operates to restrain state power as well. Law also includes

---

33. Texas Const. art. XI, section 5.

34. Calif. Const. art. XI, section 11; Ohio Const. art. XVIII, section 3; Wash. Const. art. XI, section 11.

35. Ruud at 693.

36. Alaska Local Affairs Agency, Home Rule in Alaska, 2 Alaska Local Govt. No. 8 (1962). The use of the word "prohibit" may stem from consideration of the model home rule provision of the National League of Cities which requires the legislature to "deny" power to local units. American Municipal Asso., Model Constitutional Provision for Home Rule section 6 (1953).

37. Alaska Stats. section 29.08.010 (1969 Supp.).

38. Alaska Stats. section 29.08.013 (1969 Supp.).

39. Alaska Stats. section 29.08.200 (1969 Supp.).

40. Alaska Stats. section 29.08.210 (1969 Supp.).

the provisions of the state constitution. 41 Beyond this, law is defined by the general provisions of the Alaska Constitution to mean the acts of the legislature. 42 In two instances, the Alaska Legislature has affirmatively, although not specifically, exercised its prohibitive power. First, in one statute it has adopted the common law, where it is not inconsistent with the United States Constitution, the Alaska Constitution or the acts of the legislature, as the rule of decision. 43 Secondly, another statute forbids adoption of a charter which conflicts with the laws of the state. 44 Both statutes may be viewed as express prohibitions, although they obviously do not operate to withdraw specific local powers.

It has been held that adoption of the common law by the Legislature has the effect of making it a general law. 45 If so, then a prohibition on the exercise of local power found in the common law (or a conflict between the common law and charter provisions) would result in the subordination of the local regulation. This reasoning, however, has been roundly criticized as opposed to the purpose of the common law reception statute as well as the home rule power. 46 The purpose of the common law reception statute is to give legislative approval to the court's use of the common law ". . . as the rule of decision and . . . (a) method for evolving judge-made law," 47 and does not represent the conscious allocation of power between the city and state which is implied in the home rule provision. In view of the framer's intention to confer broad legislative power on home rule cities, the common law should not be read as a limitation on its exercise unless the common law doctrine represents a substantial state interest which is not outweighed by local considerations. If home rule cities must operate within the strictures of the Constitution, the general laws and the entire body of common law, very little power is left to them.

The second implied restriction on the exercise of local power is the state statute which prohibits conflict between charter provisions and the laws of the state. 48 This statute is certainly a prohibition, although it does not restrict the

41. In City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962) the court refused to allow a home rule city to issue general obligation bonds for a land purchase which was not a capital improvement. **Alaska Const.** art. IX, section 9 forbids contracting of such debts by "any political subdivision of the State." In the face of the city's contention that a specific statutory prohibition was required, the court subjected the city to constitutional strictures. **Alaska Stats.** section 29.40.010 (1962) now makes charter provisions subject to the constitution. Cf. Reutner v. City of Cleveland, 107 Ohio St. 117, 141 N.E. 27 (1923) where certain suffrage provisions of the Ohio Constitution were found inapplicable to home rule cities.

42. **Alaska Const.** art. XII, section 11 provides that the words "by law" and "by the legislature" are used interchangably.

43. **Alaska Stats.** section 01.10.010 (1964).

44. **Alaska Stats.** section 29.40.010 (1962).

45. Genusa v. City of Houston, 10 S.W.2d 772 (Tex. Civ. App. 1928).

46. Ruud at 692-694.

47. Id. at 692.

48. **Alaska Stats.** section 29.40.010 (1962). The legislature also reiterated, in statutory form the grant of "all legislative power not prohibited by law or by charter." **Alaska Stats.** section 29.05.020 (1962).

exercise of any specific power. One commentator has argued that the introduction of the conflict concept as a general prohibition of local power is unconstitutional. **49** The legislature cannot generally and vaguely prohibit conflict; it must withdraw specific local powers. Support for this position is found in the history of Alaska Const. art. X, section 11. In reporting on the meaning of art. X, section 11, the Committee on Local Government explained that local action would be inhibited only where ". . . powers (were) **specifically withheld** by the legislature." **50** The conflict standard is a general one, but it does **specifically withhold** the power to adopt charter provisions which conflict with state laws. No violence is done to the language of the Constitution or the intent of the framers by such a general prohibition.

One further dilemma arising from the conflict statute is that it is directed at charter provisions and not at ordinances adopted pursuant to the grant of all legislative power. Arguably then, specific charter provisions could not conflict with state law, but ordinances enacted under the legislative power, even if conflicting, would stand unless prohibited. The source of the legislative power, however, is the charter; only charter cities wield home rule powers. Thus, the limitations on the charter reasonably constitute identical limitations on the legislative power gained pursuant to the charter.

It is not reasonable to assume that the United States and Alaska Constitutions are the only implied prohibitions of local regulation, even in the absence of the above statutes. Requiring the legislature to decide each preemption issue in advance is a practical, and perhaps a political, impossibility. Such a construction would force the legislature to draft a prohibition into every statute intended to apply on a uniform, state-wide basis. Aside from the sheer enormity of this task, writing the statute to reflect actual legislative intent is semantically impossible. **51** The prohibition cannot anticipate the myriad fact situations in which it may be applied. Consequently, a court interpreting the statutory language would, of necessity, create some forms of implied prohibition. It is also politically unrealistic to suppose that legislative silence represents an intention not to prohibit local regulation. The legislature may have failed to consider the particular issue involved, failed to reach a consensus on the preemption question, or have been unable to pass the statute at all if it included a resolution of the prohibition question. **52**

Implied prohibitions must flow from pervasive state interest in many areas;

---

49. But see Maier v. City of Ketchikan, 403 P.2d 34 (Alaska 1965), where the court considered whether a charter provision was in conflict with a general law without challenge to the right to the legislature to adopt a conflict standard. Alaska Local Affairs Agency, Home Rule in Alaska, 2 Alaska Local Govt. No. 8 at 3 (1962).

50. Id. (emphasis added). Reference is to Con. Con. Minutes of Committee on Local Government, 24th meeting.

51. E.g., Bellingham v. Schampera, 57 Wash. 2d 106, 356 P.2d 292 (1960). The legislature specifically stated that it preempted the field of driver licensing. The argument was made, but rejected, that this did not include suspension of drivers' licenses.

52. Calif. Governor's Comm'n. on the Law of Preemption, Report and Recommendations 12 (1967) (hereinafter cited as Calif. Commission on Preemption). See also, Report of the California Commission on the Law of Pre-emption, 2 Wash. U. Urban L. Ann. 130 (1969).

particularized restrictive formulation should not be imperative. Here the underlying purpose of the broad grant of home rule power is instructive. Cities were to be freed from any handicap to local response to problems in the absence of state action, not to be enthroned as city-states with mini-legislatures. **53**

III. A Conceptual Approach to Home Rule

A. Current Conflict Doctrine

One reason for avoiding conflict-of-laws terminology may have been the uncertainty and confusion present in existing doctrine. A helpful way to examine state-local conflict doctrine is by classifying the kinds of conflicts between statutes and ordinances. **54** A brief survey of several types of conflicts will illustrate varying judicial treatment of similar problems.

A conflict which is not a direct verbal conflict occurs when local ordinances duplicate, without variance, a state law. **55** There is a conflict, and general law has been held to take precedence on grounds of double jeopardy and jurisdictional confusion in some states, **56** while duplicating ordinances have been sustained in others, as not in conflict with state statutes. **57**

Direct verbal conflicts are tested by deciding whether the statute permits what the ordinance forbids, or vice versa. Most courts have little difficulty when the ordinance permits what the statute prohibits. **58** However, exceptions are found where the prohibitive language of the statute is arguably general and not intended to apply to municipalities. **59** The converse question, **i.e.** where the ordinance forbids what state law permits, is treated less consistently. **60**

---

53. **Vandlingham** at 311. **See also** Alaska Local Affairs Agency, **Home Rule in Alaska**, 2 **Alaska Local Govt.** No. 8 at 6 (1962).

54. **See generally** Peppin, **Municipal Home Rule in California III**, 30 **Calif. L. Rev.** 1 (1941); **Ruud supra** note 20; **Trautman supra** note 30.

55. C. **Antieau, Municipal Corporation Law** section 5.27 (1968).

56. In Re Sic, 73 Cal. 142, 14 P. 405 (1887).

57. Seattle v. Long, 61 Wash. 2d 737, 380 P.2d 472 (1963); Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923); State v. Quong, 8 Ida. 191, 67 P. 491 (1902).

58. City cannot license coin token machines prohibited by state statute. Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N.E.2d 159 (1939). City ordinance places 4-year statute of limitations of suits to collect delinquent taxes; state law forbids limitations on city suits to collect delinquent taxes. City of Beaumont v. Fall, 116 Tex. 314, 291 S.W. 202 (1927). State law prohibits "bawdy" houses; ordinance licenses their operation. Farmer v. Behmer, 9 Cal. App. 773, 100 P. 901 (1909).

59. E.g., Requirement of municipal permit to sell beer in conflict with state licensing statute. Auxter v. City of Toledo, 173 Ohio St. 444, 183 N.E.2d 920 (1962). City charter establishing a six month statute of limitations for suits by city employees injured on the job held in conflict with state statute providing 2-year statute of limitations for personal injury suits. City of Waco v. Thrall, 128 S.W.2d 462 (Tex. Civ. App. 1939, **error dismissed**).

60. E.g., C.I.O. v. City of Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946) where a state statute making it lawful for any employee to become a member of a labor union was held inapplicable to city employees who were forbidden by ordinance to join unions. **But see** Yakima v. Gorham, 200 Wash. 564, 94

Although the legislature has clearly enunciated its permissive policy, again the courts must determine whether that policy was intended to apply to home rule cities.

The greatest imbroglio arises in the implied preemption cases, when the legislature's policy must be inferred from a general scheme of regulation. The broad spectrum in this class of cases includes legislative action which is subverted by local regulation, **61** statutes which apparently contemplate supplemental local regulation, **62** and the troublesome area where the scheme of regulation implies only a "negative" intent. **63** Courts finding preemption by a general scheme of legislation focus on a determination of legislative intent. **64** Therefore, the purpose of the statute, as well as the policy the plan represents, must be carefully scrutinized. **65**

This well-established judicial practice of finding preemption by occupation of the field has been criticized as an "unservicable" doctrine because of the uncertainty involved in deciding what the "field" is and virtual inability to forecast when the field is occupied. **66** The practice is especially damned when the intent of the legislature is found to be negative, **i.e.** an intent not to penalize inferred from omission of sanctions on particular conduct. **67** This is, of course, the

---

P.2d 180 (1939). In that case a local ordinance severely restricting picketing activities was found to be in conflict with a state anti-injunction statute.

61. E.g., State taxes operation of pinball machines; local ordinance forbids their operation. City of Ft. Worth v. McDonald, 293 S.W.2d 256 (Tex. Civ. App. 1956). State licenses electrical contractors; city imposes additional licensing requirements. Agnew v. City of Los Angeles, 110 Cal. App. 2d 612, 243 P.2d 73 (1952).

62. E.g., City regulates hours of barbers; state regulates licensing and qualifications. Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N.E. 187 (1935). The test is whether the supplementary regulation furthers the purpose of the general statute and is appropriate to local needs. Natural Milk Producers Assn. v. City of San Francisco, 20 Cal. 2d 101, 124 P.2d 25 (1942). See also Lenci v. City of Seattle, 63 Wash. 2d 664, 388 P.2d 926 (1964) which upheld a city ordinance requiring an 8 foot fence around a wrecking yard although state required only a minimum of six feet.

63. E.g., In re Lane supra note 4.

64. Lenci v. City of Seattle, supra note 62. See generally C. Antieau, Municipal Corporation Law section 5.28 (1968).

65. Abbott v. City of Los Angeles, 53 Cal. 2d 674, 349 P.2d 974 (1960).

66. Antieau section 5.38 at p. 292.38. Antieau feels that the " . . . doctrine is a too handy prop for invalidating municipal rules with which jurists are unsympathetic. One cannot help but notice how avidly courts invalidate municipal regulations in one 'field' on the theory that it has been occupied, while condoning considerable regulation in another." Id. at p. 292.38. Cf. Ruud at 705, and Blease, Civil Liberties and the California Law of Preemption, 17 Hast. L. J. 517, 569 (1966) (hereinafter referred to as Blease).

67. The Lane opinion was revised to clarify this notion. Mere absence of legislative sanction on the particular conduct was not the sole basis for inferring legislative intent not to penalize. The absence has to be coupled with regulation so extensive in its scope that it indicated " . . . an intention to adopt a general scheme for the regulation of (the) subject." 58 Cal. 2d at 103, 372 P.2d at 899. For a complete discussion of both Lane opinions, including the dissents and concurring opinion, see Blease at 548-553.

rationale of **In re Lane** 68 and the argument advanced in the **Rubey** case. The **"Lane doctrine"** provoked a flurry of criticism and activity on the part of local government officials who feared that vast areas of local regulation would be preempted on unpredictable grounds. 69 Although local fears are not justified either by subsequent treatment of the implied preemption doctrine in the California courts 70 or prior handling of the doctrine, 71 their concern does reflect its uncertainty—especially when coupled with volatile local moral issues.

As previously indicated, it is unrealistic to require the legislature to make express commands in order to assure that its statutes will be applied uniformly. Implied conflict, or implied prohibition must be available as a judicial tool for solution of unanticipated situations and to insure consistency in the application of principles. The failure lies not in the doctrine itself, but in the failure to isolate the interests supporting the ordinance or statute and decide between them in accordance with clearly specified standards.

B. A Suggested Method for Allocation of Power Between State and Local Government

A decision that a local regulation is in conflict with or prohibited by state law is essentially an allocation of power between two units of government. That decision can be made by the legislature as it enacts particular statutes, or it can be made by the court in the context of a particular fact situation. 72 Regardless of the identity of the decision maker, allocation is a balancing process with its concomitant uncertainty. The uncertainty is alleviated, but not foreclosed, if the legislature decides when local power should be withdrawn. 73 However, the court may be called upon to assist in the allocation either in a fact situation not

68. **Supra** notes 4 and 67. For additional comment on the Lane case see Note, **Municipal Corporations: Ordinances In Conflict with General Laws**, 10 U.C.L.A. L. Rev. 440 (1963); Note, **Municipal Corporations: Ordinances Invalid Where State Legislature has Pre-Empted Field**, 50 Calif. L. Rev. 740 (1963); Comment, **The California City versus Preemption by Implication**, 17 Hast. L. J. 603 (1966).

69. E.g., Putnam, **State Preemption—Survey of Past and Future, League of California Cities, Conference Report** (1964); **Blease** at notes 2 and 3. The League of California Cities in 1963 (Calif. Assem. Const. Amend. 30 and Calif. Sen. Amend. 12) in 1965 (Calif. Assem. Const. Amend. 2 and Calif. Sen. Const. Amend. 13) proposed the Calif. Const. art. XI, section 11 be amended to require express legislative declaration of intent to preempt.

70. E.g., Galvan v. Superior Ct., 70 Cal. 2d 851, 452 P.2d 930 (1969), upholding a local gun registration ordinance, and In re Hubbard, 62 Cal. 2d 119, 396 P.2d 809 (1964). See generally **Blease** at 553-560.

71. Blease substantiates and traces the long history of the "Lane doctrine" in California. He points out that it is not a "new" phenomenon as contended by many other commentators. He attributes the vigorous local response to Lane to the nature of the ordinance involved in the case. This involved, he contends, " . . . the larger issue of police practices and the actions of courts . . . in expanding the rights of individuals." **Blease** at 568.

72. See Sandalow, **The Limits of Municipal Power Under Home Rule: A Role for the Courts**, 48 Minn. L. Rev. 643 (1964) (hereinafter cited as **Sandalow**).

73. The proposal advanced by the California League of Cities has this advantage. However, the court would still have to interpret the statutory language to determine whether an express preemption was present in the particular fact situation.

anticipated by the statute, or under a general standard, such a conflict, enacted to cover those instances where the legislature did not, or could not, make the preemption decision.

In Alaska, the home rule city and the legislature theoretically possess identical powers. 74 The constitutional rule for allocation of power permits the powers of the former to be withdrawn by the latter except with respect to purely local government powers. What considerations should prompt withdrawal of local power by the legislature, or by the court acting under its general instructions?

Initially, the state has an interest in uniform application of its statutes throughout the state. The nature of that interest is two-fold; (1) the economic integrity of the state must be protected, and (2) the rights and privileges of the individual as a citizen of the state must be safeguarded.

> Multiplicity of local regulations affecting the movement of goods or persons generally will empede or burden commerce to the economic detriment of the state. Local regulations might seek to protect local business against outside competition, again causing serious adverse effect upon the economy of the State. Varying local regulations may create a patchwork of standards which would tend to cause confusion, (and) obstacles to the movement of a transient population.... 75

The economy of the state is at stake in programs which are heavily or entirely financed by the state. Added expense to comply with local regulations affecting the project itself or its administration is wasteful if peculiar local conditions do not support the regulation.

A statewide consensus is desirable in governmental control of individual conduct. 76 Preemption doctrine, both state and federal, has frequently been employed as a subconstitutional protection of the individual against the parochialism often present in local regulation. 77

> Local governments, because of smaller constituencies, fewer organized interest groups, tendencies toward greater homogeneity of population groupings, and more intense operation of social and economic pressures, may, more easily than state legislatures, impose the moral convictions of

---

74. An analogy between the federal-state relationship and the intended state-local relationship is drawn in the constitutional history of the Alaska home rule provision. Alaska Legis. Council & Local Affairs Agency, Final Report on Borough Government 36 (1961). Therefore, the history states, the municipality is free to act on any subject until the power is withdrawn. This is traceable to Keith, Home ule Texas Style, 44 Natl. Mun. Rev. 184 (1955) who drew a similar analogy between Texas home rule cities and the Texas Legislature. While tempting, the analogy is less apt than an analogy to the relationship between states. The allocation of power between the states and the federal government resulted in enumerated federal powers. Each state, as with Alaska home rule city and the Alaska Legislature, possesses identical powers. Under modern conflicts doctrine, the allocation of power is made by balancing the interests of each state.

75. Calif. Commission on Preemption at 8-9. See also Sato, Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce, 53 Calif. L. Rev. 801 (1965).

76. Calif. Commission on Preemption at 10.

77. Blease at note 343.

> relatively stable political majorities upon dissidents or other minority groups in the community. . . . (T)he issue is not . . . whether local citizens are assumed to be less wise when acting locally than when acting at the state level; rather it is whether the political processes at the local level are adequate to achieve or protect basic community values 78

Uniformity is also desirable where state administration is essential to the success of the statutory scheme. For example, the rate and benefit structure of workmen's compensation laws must be continuously revised on the basis of experience. The volume of data as well as the broad territorial base needed for intelligent administration point to state control without local interference.

Once the state interest in the legislation is identified, it should be balanced against local needs. In view of the broad powers granted to Alaska home rule cities and the constitutional fiat to construe that power liberally, local regulation should stand unless the state interest outweighs it. However, even a substantial state interest would not outweigh local needs if the ". . . nature and magnitude of the problem varies throughout the state . . ." 79 In that case supplemental local regulation is necessary and desirable. Similarly, conduct which should be regulated on the basis of statewide consensus may be subject to local sanction if the ordinance reflects a response to an imminent or serious threat to the health, safety, or welfare of the community. 80

Both the legislature and the courts have a clear role in the coherent allocation of power between the state and local units of government. The decision to withdraw local power, however, should result from a balancing of clearly identified state and local interests. The desire for certainty in the balancing process may be partially satisified if the legislature addresses the preemption decision in the first instance. But when the legislature is silent, or when its prohibition does not cover a variant, unanticipated fact situation, the court should not indulge in a conclusive presumption that local regulation is permitted. "The price of certainty is too high when it involves a failure to face the real policy questions involved." 81 The court, like the legislature, must consider, articulate and balance state and local interests to insure consistent application of preemption principles. The purpose of a broad grant of power to home rule cities was to enable creative local response to urban problems. Careful legislative and judicial consideration of preemption questions will foster unfettered use of that power in the intended manner.

IV. Conclusion

As the Supreme Court recognized in the **Rubey** case, the general subject of preemption by state law is complex. It is, in the final analysis, a decision which will result in the allocation of power between state and local units of government. It is urged that the judiciary assume a vigorous role in this process, basing its decisions on a clear analysis of the nature and scope of the interests involved. In this manner the intent of the framers in granting broad home rule powers will be furthered without jeopardizing the needs of the state as a whole.

78. **Sandalow** at 711. **Accord, Blease** at 569.

79. **Calif. Commission on Preemption** at 10.

80. **Id.**

81. **Id.** at 6.

LINDA H. DUVALL

Blank page

Appendix E

AS 29.10.010 – 29.10.090, Procedures for Adoption of a Home Rule Charter by an Existing Municipal Government

Blank page

APPENDIX E
1999 ALASKA STATUTES GOVERNING ADOPTION OF A HOME RULE CHARTER BY AN EXISTING MUNICIPALITY (AS 29.10.010 – 29.10.090)

Sec. 29.10.010. Municipal charter adoption.

(a) A general law borough or first class city may adopt a charter for its own government.

(b) [Repealed, Sec. 31 ch 58 SLA 1994].

(c) At an incorporation, merger, or consolidation election a municipality may adopt a charter for its own government and incorporate, merge, or consolidate as a home rule city, borough, or unified municipality.

(d) A home rule municipality may adopt a new charter.

(e) A proposed charter for an existing municipality is prepared by a charter commission of seven elected members. A charter commission election is called by filing a petition with the governing body or by resolution of the governing body. The petition shall be signed by a number of voters equal to 15 percent of the votes cast in the last regular election in the municipality. The petition shall be prepared by the municipal clerk upon receipt of an application meeting the requirements of AS 29.26.110 except that instead of containing an ordinance or resolution the application shall request a charter commission election. The petition shall be prepared in accordance with AS 29.26.120 , except material required under AS 29.26.120 (a)(1) and (2) shall be replaced with the question of whether a charter commission shall be formed. The signature requirements of AS 29.26.130 (a), (c), and (d) apply to the petition. The completed petition shall be submitted to the clerk who shall deliver it to the governing body with a report of the number of valid signatures determined by the clerk to be on the petition.

(f) The proposed charter for a home rule municipality to be formed by incorporation, merger, or consolidation shall be prepared by the petitioners and filed with the petition to incorporate, merge, or consolidate a home rule city, borough, or unified municipality.

Sec. 29.10.020. Model charters.

The department shall prepare at least one model home rule charter for a city, borough, and unified municipality. The model charters shall be made available to persons interested in filing a petition to form a home rule municipality under AS 29.05.060 or AS 29.06.090.

Sec. 29.10.030. Initiative and referendum.

(a) A home rule charter shall provide procedures for initiative and referendum.

(b) A charter may not require an initiative or referendum petition to have a number of signatures greater than 25 percent of the total votes cast in the municipality at the last regular election.

(c) A charter may not permit the initiative and referendum to be used for a purpose prohibited by art. XI, Sec. 7 of the state constitution.

Sec. 29.10.040. Charter commission candidates.

(a) A candidate for a charter commission of an existing municipality shall have been qualified to vote in municipality for at least one year immediately preceding the charter commission election.

(b) A charter commission candidate is nominated by a petition signed by at least 50 voters or the number of voters equal to 10 percent of the number of votes cast in the municipality during the last regular election, whichever is less. A nomination petition shall be filed with the municipal clerk on or before a date fixed by the governing body.

(c) If at least seven nominations for qualified charter commission candidates are not filed, the petition or resolution calling for a charter commission is void and an election on the question may not be held.

Sec. 29.10.050. Charter commission election.

At a charter commission election the voters of an existing municipality shall consider the question "Shall a charter commission be elected to prepare a proposed charter?" and shall elect the members of the commission. If the question is approved, the seven candidates receiving the highest number of votes immediately organize as a charter commission.

Sec. 29.10.060. Preparation of charter by charter commission.

The charter commission shall, within one year, prepare a proposed home rule charter for an existing municipality. The proposed charter shall be signed by a majority of the members of the commission and filed in the office of the municipal clerk. Within 15 days, the clerk shall have the proposed charter published and make copies available. The commission shall give published notice of and hold at least one public hearing on the proposed charter before the signing and filing of the charter.

Sec. 29.10.070. Charter election.

The proposed home rule charter for an existing municipality shall be submitted to the voters at an election held not less than 30 days or more than 90 days after the proposed charter is published. The proposed home rule charter for a home rule municipality to be formed by incorporation, merger, or consolidation shall be submitted to the voters at an election held under AS 29.05.110 or AS 29.06.140 .

Sec. 29.10.080. Charter adoption.

(a) If a majority of those voting in an existing municipality favor the proposed charter or if a majority of those voting to form a home rule municipality by incorporation, merger, or consolidation favor incorporation, merger, or consolidation, the proposed charter becomes the organic law of the municipal-

ity effective on the date the election is certified. Thereafter, a court shall take judicial notice of the charter. The new home rule municipality shall file the indicated number of copies of the charter with

(1) the lieutenant governor - two copies;

(2) the department - two copies;

(3) the district recorder - one copy;

(4) the municipal clerk - one copy.

(b) At the time of voting on the proposed charter in a third class borough, voters shall vote also on whether the borough shall, on adoption of the charter, retain a combined assembly and school board or elect a separate assembly and board as otherwise provided for home rule boroughs. If a combined assembly and school board are approved at the charter election, the assembly serving at the time of the election continues to serve as the assembly and board on voter approval of the charter and until terms of assembly members expire as provided before adoption of the charter. If a separate board and assembly are approved at the charter election, a school board shall be elected in conformity with AS 14.12.030 - 14.12.100 at the next regular election, if it occurs within 90 days of the date of the charter election, or otherwise at a special election within 90 days of the date of the charter election. Expiration dates of terms of school board members elected at a special election shall coincide with the date of the regular election. Until a board is elected and qualified, the assembly continues to serve as the board.

Sec. 29.10.090. Charter rejection.

(a) If a proposed charter for an existing municipality is rejected, the charter commission shall prepare another proposed charter to be submitted to the voters at an election to be held within one year after the date of the first charter election. If the second proposed charter is also rejected, the charter commission shall be dissolved and the question of adoption of a charter shall be treated as if it had never been proposed or approved.

(b) If incorporation, merger, or consolidation of a home rule municipality is rejected by the voters, the proposed charter is rejected.